Office-Supreme Court, U.S.
FILED
MAR 23 1981
ALEXANDER L. STEVAS,
CLERK

80-1620

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF PHILADELPHIA,

Petitioner,

vs.

SUSAN JANE B. GILFILLAN, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

T. MICHAEL MATHER,
Chairman, Litigation Department,

ALAN J. DAVIS
City Solicitor,

Attorneys for Petitioner,

1500 Municipal Services Building,
15th and J.F. Kennedy Boulevard,
Philadelphia, Pennsylvania 19107
(215) MU 6-5227

Pennsylvania Appellate Printing Co.—(215) 561-3877

QUESTION PRESENTED FOR REVIEW

Does the provision of a platform by the City of Philadelphia for Pope John Paul II's visit so the citizens would be able to see and hear the Pope, to help ensure safety, and to promote the City's image violate the Establishment Clause of the First Amendment because the Pope used the platform to perform a Mass?

LIST OF ALL PARTIES TO PROCEEDING

Petitioner
City of Philadelphia

Respondents
Susan Jane B. Gilfillan
American Civil Liberties Union,
Greater Philadelphia Branch
Reverend Mary Anne Forehand
National Ministries, American Baptist
Churches in the U.S.A.

Respondent Intervenors
Reverend Walter Weider
Reverend Bryan Kopke
Bertha R. Smith
Herbert S. Herrman
Gerard H. Bye
Antoinette Montanaro
Elizabeth M. Calter
Martha Walker Miln
Paul H. Fox
Janice Schulte

TABLE OF CONTENTS

Question Presented for Review i

List of All Parties to Proceeding ii

Opinions Below 1

Statement of Jurisdiction 1

Text of Constitutional Provision Involved 2

Statement of the Case 2

REASONS FOR GRANTING THE WRIT:

I: The decision of the Court of Appeals violates the principle of government neutrality toward religion by holding that the government must not provide otherwise regularly provided governmental services because these services will be used in conjunction with a religious activity. 6

A. The purpose of the platform was to promote public safety 6

B. The primary effect of the platform was not to advance religion 10

II: The decision of the Court of Appeals fosters increased entanglement of church and state over the provision of normal governmental services and thereby violates the First Amendment 13

III: The decision of the Court of Appeals, by denying normal government services on the basis of the character of speech contemplated in connection with those services, violates the first amendment and is in conflict with the recent decision of the Eighth Circuit Court of Appeals in *Chess v. Widmar* and the recent decision of the District of Columbia Court of Appeals in *O'Hair v. Andrus* 15

Conclusion 25

TABLE OF CONTENTS

CASES CITED:

Baird v. White,
476 F. Supp. 442 (D.Mass. 1979) 14

Board of Education v. Allen,
392 U.S. 236 (1968)..... 11, 16

Chess v. Widmar,
480 F. Supp. 907 (W. D. Mo. 1979) No. 80-1048 (8th Cir., slip op., August 4, 1980, rehearing denied September 19, 1980, petition for certiorari granted 49 LW 3595) .....
19, 21, 23, 24

Committee for Public Education and Religious Liberty v. Regan,
48 U.S.L.W. 4168 (U.S. Sup. Ct., Feb. 20, 1980) 10

Everson v. Board of Education,
330 U.S. 1 (1947) 11, 16

Fowler v. Rhode Island,
345 U.S. 67 (1953) 20

Gilfillan v. Philadelphia,
480 F. Supp. 1161 (E.D. Pa. 1979), *affirmed* by Opinion dated December 30, 1980 (3rd Cir. 1980) 6

Hunt v. McNair,
413 U.S. 734 (1973) 11

Lemon v. Kurtzman,
403 U.S. 602 (1971) 10, 14

Meek v. Pittenger,
421 U.S. 349 (1975) 11

TABLE OF CONTENTS

CASES CITED:

Murdock v. Pennsylvania,
319 U.S. 105 (1943) 20

O'Hair v. Andrus,
613 F.2d 931
(D.C. Cir. 1979) 13, 17, 18, 19, 22, 24

Roemer v. Board of Public Works of Maryland,
426 U.S. 736 (1976) 10, 11, 14, 16

Serbian Eastern Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) 14

Tilton v. Richardson,
403 U.S. 672 (1971) 20, 22

Walz v. Tax Commission of the City of New York,
397 U.S. 664 (1970) 11, 16, 18, 21

Wolman v. Walter,
433 U.S. 229 (1977) 11, 16

Zorach v. Clauson,
343 U.S. 306 (1952) 10, 11, 16

UNITED STATES CONSTITUTION CITED:

Amendment 1 ..... 2, 7, 13, 15, 16, 17, 18, 20, 21, 24, 25

UNITED STATES CODE CITED:

28 U.S.C. §1254(1) 2

RULE CITED:

Federal Rule of Civil Procedure 24(b) 5

APPENDIX

Memorandum Opinion of Judge Broderick, U.S. District Court, Eastern District of Pennsylvania Dated November 9, 1979 ..... 1a

Orders of Judge Broderick, U.S. District Court, Eastern District of Pennsylvania Dated November 9, 1979 ..... 20a

Opinion of United States Court of Appeals for the Third Circuit Dated December 20, 1980 ..... 24a

Judgment of the United States Court of Appeals for the Third Circuit Dated December 20, 1980... 56a

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF PHILADELPHIA,

Petitioner,

vs.

SUSAN JANE B. GILFILLAN, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit in No. 79-2786 was filed December 30, 1980 and is not yet officially reported. The opinion of the United States District Court for the Eastern District of Pennsylvania was filed November 9, 1979 and is reported at 480 F. Supp. 1161 (E.D. Pa. 1979). Copies of both opinions appear in the Appendix hereto.

STATEMENT OF JURISDICTION

Judgment was entered in the United States District Court for the Eastern District of Pennsylvania against petitioner City of Philadelphia on November 9, 1979.

This judgment was affirmed by the United States Court of Appeals for the Third Circuit by opinion dated December 30, 1980.

This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

TEXT OF CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

When City of Philadelphia officials learned in September of 1979 that Pope John Paul II planned to visit Philadelphia as part of his journey to the United States, they immediately recognized the possible public relations bonanza for the City. The Commissioner of Public Property, Robert Silver, was given the responsibility of arranging for the provision of the types of City service consistent with what had been provided in the past for visiting dignitaries. Although Commissioner Silver attended several meetings at which representatives of the Archdiocese were present, he had the responsibility of staging the event. Commissioner Silver was aware that the Pope planned to say an outdoor Mass in Philadelphia.

Instead of telling the Pope he would not be permitted to say Mass on public property, Commissioner Silver and his department began planning for the anticipated arrival of over 1 million people who were expected to

come to see the Pope. Logan Circle was chosen as the site for the Pope's Mass because of the excellent visual and audial access that would be provided by that location and because it was the most accessible location by public transportation. It was also the location that would best highlight the beauty of Philadelphia to all those across the country who would witness the Pope's visit to Philadelphia in the national media.

Because it was customary to build platforms for appearances by visiting dignitaries and in order to enable the maximum number of citizens to see and hear the Pope and to best provide for safety from surging crowds, Commissioner Silver decided to build a platform over the fountain in Logan Circle. The size of the platform was dictated by its location and the size of the fountain. The platform was painted white and partially carpeted. The fountain area was landscaped with shrubs and flowers for aesthetic purposes. A cross was erected at the top of the platform. The platform design was shown to representatives of the Archdiocese but they had no input in its design.

While preparations for the October 3, 1979 visit of Pope John Paul II to Philadelphia were in progress, plaintiff-taxpayers brought an action in the United States District Court for the Eastern District of Pennsylvania to enjoin the City of Philadelphia "from using or permitting the use of City workers, property, equipment or supplies and the expenditures of public funds in connection with or in support of the sectarian activities planned for the Pope's visit to Philadelphia, including but not limited to a prohibition against the use of City workers, property, equipment or supplies and the expenditure of public funds for the construction of the Logan Circle structure."

With the assistance of the District Court, an agreement was worked out between the parties permitting the

Pope's visit to proceed as planned. The Archdiocese of Philadelphia had agreed to reimburse the City for "all costs incurred in the construction of the platform at Logan Circle," in the event there was a final judgment for plaintiff-taxpayers in the action.

The Pope performed a Mass and gave a sermon on the Logan Circle platform on October 3, 1979. All of the items necessary to the Mass itself which were used on the platform were supplied by the Archdiocese. The public relations bonanza anticipated by the City was fulfilled. The platform performed its function as the hundreds of thousands of witnesses could see and hear the Pope and the entire event was conducted safely.

After the Pope's visit, a hearing was held on October 9, 1979 before the District Court. Post-hearing depositions were held and submitted to the District Court on the actual amounts of the expenditures. At the hearing, Judge Raymond J. Broderick received and reserved decision on a petition to intervene filed by the Reverend Walter Weider, Rev. Bryan Kopke, Bertha R. Smith, Herbert S. Herrman, Gerard H. Bye, Antoinette Montanaro, Elizabeth M. Calter, Martha Walker Miln, Paul H. Fox and Janice Schulte ("Intervenors").

On November 9, 1979, the District Court issued a Memorandum Opinion and Order holding that "the expenditure of funds by the City of Philadelphia for the construction of the platform and its appurtenances in connection with the visit to Philadelphia of Pope John Paul II violated the First Amendment to the Constitution of the United States." The District Court found that the amount of unlawful expenditure totaled $204,569 and ordered the City to immediately take all necessary steps to obtain reimbursement of that sum from the Archdiocese of Philadelphia. On the same day the District Court denied the petition to intervene but permitted the inter-

venors to intervene pursuant to Federal Rule of Civil Procedure 24(b), only as to those claims raised by the original plaintiff-taxpayers.

The City appealed the District Court's judgment to the United States Court of Appeals for the Third Circuit. In an opinion filed December 30, 1980, the Court of Appeals affirmed 2-1. The majority opinion was written by Circuit Judge Rosenn and joined in by Circuit Judge Garth. A dissenting opinion was filed by Circuit Judge Aldisert.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals violates the principle of government neutrality toward religion by holding that the government must not provide otherwise regularly provided governmental services because these services will be used in conjunction with a religious activity.

A. *The purpose of the platform was to promote public safety*

In connection with the visit of Pope John Paul II to Philadelphia in October, 1979, the City of Philadelphia expended approximately $1,200,000 on additional City security services. The largest expenditures by far were for police overtime for one aspect of security for the visit. Approximately $310,000 was expended on the platform constructed over the Logan Circle fountain where the Pope performed a nationally televised Pontifical Mass witnessed live by close to one million citizens.

The evidence showed that the City planned and constructed the platform in the interest of the Pope's security, the safety of the crowd and the maximum possible access of those who wished to see and hear the Pope. *Gilfillan v. Philadelphia*, 480 F. Supp. 1161, at 1164 (E.D. Pa. 1979), *affirmed* by Opinion dated December 30, 1980 (3rd Cir. 1980) (Appendix p. 1a). The District Court opinion stated: "The Court does not question the sincerity of the City's expressed reasons for building the platform at Logan Circle in preparation for this extraordinary event." *Gilfillan v. Philadelphia*, *supra* (Appendix, p. 6a). Despite this finding that the purposes behind the platform expenditures were the same purposes behind the expenditures on police overtime, the District Court held, and the majority opinion of the Court of Appeals affirmed, that the $204,569 of platform expendi-

tures which were not for reusable items were unconstitutional under the Establishment Clause of the First Amendment (Opinion dated December 30, 1980, Appendix, p. 22a). In effect, the courts below distinguished police security expenditures from platform security expenditures. The distinction was based exclusively on the character of the Pope's activity while taking advantage of the City services provided. The effect of the decisions below is that where the Pope refrains from religious activity and waves to the crowd, reads a poem, sings a song or gives a speech, the citizens watching him are entitled to whatever security is thought necessary, but where he performs a Mass, security precautions must be relaxed because of concerns emanating from the Establishment Clause. The decisions below are wrong and misapplied the law by finding that the primary purpose and effect of these platform expenditures were to benefit religion.

As Judge Aldisert points out in his dissenting opinion in the Court of Appeals (Appendix, p.39a), viewed against the historical setting available to the City immediately prior to the Pope's visit, the City could have reasonably reached three purely secular conclusions. First, Pope John II's position as head of the Catholic Church, as well as his much publicized personal charisma, would draw a huge crowd of Catholics and non-Catholics to his outdoor appearance at Logan Circle. Second, the safety of the expected crowd, for which the City remained primarily responsible, would be endangered if the Pope were not visible to a large percentage of the persons in attendance. Finally, an essential means of controlling the expected crowd would be assurance that the Pope would be visible to and heard by the crowd. These conclusions led quite rationally to the purely secular decision to build the platform and purchase sound amplification equipment.

Hindsight demonstrates that these safety considerations were sound. The City safely avoided the shoving and pushing like that which later led to the May 4, 1980 tragedy in Zaire when nine people were trampled to death during the papal visit there. A subsidiary purpose was to promote the image of the City of Philadelphia so those watching the Pope's visit on television would retain a positive image of the attractiveness of the City. The evidence showed that the City had a policy of providing platforms for distinguished visitors.

Despite this evidence of secular purposes behind the platform, the reasonableness of these purposes, and the District Court's finding that he accepted the sincerity of the City's purposes, both the District Court and the majority in the Court of Appeals concluded that the primary purpose behind the expenditures was non-secular and, therefore, forbidden under the Establishment Clause. Neither opinion below cites any evidence, but relies instead on the rather simplistic assertion that because the platform was used for celebration of Mass and the Holy Eucharist, the City's primary motivation must have been sectarian (Appendix, pp. 45a-46a). This reasoning merely assumes that the justifications offered by the City are pretextual and fails to explain why the benefit to the Catholic Church was not merely incidental to the predominant purpose of public safety.

As Judge Aldisert argued in his dissent,

> ". . . to permit the celebration of the Mass in a public place, as the appellees concede we should, but to abjure an elevated platform from which the Pope will be made visible to a million people, or an amplifying system which would carry his voice to them, and to deny the City the right to decorate the Logan Circle with flowers, a worldwide symbol of hospitality, is, in my view, sheer sophistry. No constitu-

> tional scholar, on or off the bench, has previously defended such a diaphanous distinction" (Appendix, p. 49a).

The majority opinion of the Court of Appeals states that

> ". . . we cannot accept the City's argument as a sufficient secular purpose for the platform in light of its design and primary purpose to *create a splendid setting* for the religious service" (Appendix, p. 29a).

If the fault in the platform is that it "created a splendid setting," the fault is not in the platform itself but in its decoration and the appropriate ruling by the District Court would have been to hold unconstitutional only those expenditures related to the unconstitutionally splendid nature of the platform rather than those expenditures to build the platform itself. In fact, the District Court found that expenditures on the flowers were not unconstitutional because the flowers were capable of reuse. Moreover, as Judge Aldisert points out, the City of Philadelphia could have anticipated wide media coverage of the event and desired to make the most of the papal visit's public relations benefit to the City (Appendix, pp. 46a-47a). In fact, there was specific evidence that this was one of the City's purposes.

The majority opinion in the Court of Appeals states that the expenditures on the platform were

> "all of a kind never offered other organizations, religious or non-religious" (Appendix, p. 26a).

This is only true in the sense that duplicate replicas of the platform were never provided. However, the evidence showed that it was a City custom to build platforms for visiting dignitaries. The City Representative testified that the City's intent was to provide services similar to those provided in the past. The scope of these

services was dictated by the enormity of the anticipated crowds and not by any religious considerations.

B. *The primary effect of the platform was not to advance religion*

The Pope's visit to Philadelphia was a one-time event. In examining governmental action under the primary effect criterion, the Court should remember that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 746 (1976). Total separation between church and state is neither possible nor constitutionally mandated. See *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). The Pope's Mass, which consumed only a short period on a single day, is totally different from repeated religious activities like the daily reading of prayers in a school room. In finding a primary religious effect, again the majority opinion in the Court of Appeals took refuge in the "magnificent setting provided by the City," (Appendix, p. 33a) as if the splendor of the occasion were the basis for the unconstitutional effect. The platform undoubtedly enabled a greater number of people in the vicinity of Logan Circle during the Pope's visit to see and hear the Pope. It does not follow that the primary effect of the platform was a religious one. It is simply *not* the law that any "remote and indirect aid to religion" is unconstitutional.

Many cases have upheld various types of programs which arguably aid religion. *Committee for Public Education and Religious Liberty v. Regan*, 48 U.S.L.W. 4168 (U.S. Sup. Ct., Feb. 20, 1980) (upheld reimbursement of actual costs incurred by religious schools as a result of compliance with state-mandated requirements,

including the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting and other similar state prepared examinations and reporting procedures). *Wolman v. Walter*, 433 U.S. 229 (1977) (upheld provisions of Ohio statute as to supplying non-public school students with textbooks, standardized testing and scoring services, diagnostic services and therapeutic and remedial services); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976) (upheld Maryland statute which provided for annual non-categorical grants to private colleges, including religious institutions, subject only to the restriction that the funds not be used for sectarian purposes); *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Board of Education v. Allen*, 392 U.S. 236 (1968) (upheld governmental provision of secular textbooks on an equal basis to children attending public and private, including religious, schools); *Everson v. Board of Education*, 330 U.S. 1 (1947) (upheld publicly financed transportation for parochial school children as part of a program applicable to all school-age children); *Hunt v. McNair*, 413 U.S. 734 (1973) (upheld governmental financial aid to church related colleges for construction of buildings to be used for secular purposes only); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upheld program which permitted public schools to release students so that they might go to religious centers for instruction or devotional exercises); *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970) (upheld tax exemptions for property used for religious purposes). It is submitted that all of those cases, even though the expenditures were upheld, involve potential for a greater effect of advancing religion than can be found in this case. This case involves a one-time event

that lasted a short time chronologically and the cases cited above contain the prospect for a continuing relationship between church and state. By finding a constitutional violation where a major element of all prior cases is missing, the lower courts here have departed totally from Supreme Court precedent and blazed a new and highly questionable trail, engrafting an impermanency onto the word "establishment" that is contrary to its very meaning. The services provided here were understandable in their unique context. As Judge Aldisert points out in his dissent, the Pope is a totally different visitor from a Cardinal or a Bishop (Appendix, p. 41a). It is not only that he is the head of state of the Vatican, but more that he is one of the few individuals in the world who could command a huge crowd of citizens interested in seeing and hearing him.* Because of the anticipated large crowds, it is understandable that the City would take various kinds of security precautions and would use the opportunity for a media event promoting the City. Thus, there is little risk of the City's actions being interpreted as placing an imprimatur of approval on the Catholic religion. The unique and unprecedented nature of the Pope's visit provides a supervening cause for the expenditures which renders them understandable totally apart from any context of City "sponsorship" of the Pope.

---

* There is a certain decorum recognized in greeting foreign dignitaries of a certain stature, whether that stature is political, cultural, religious, or a combination. During Pope John Paul II's recent three-hour stopover visit to Alaska, the Reagan administration sent a planeload of 48 VIP's from Washington to Anchorage, Alaska to greet the Pope. Did this act connote federal government "sponsorship" of the Roman Catholic faith or was it merely a recognition of the Pope's stature as a visitor?

The lower courts' distinction between expenses for security precautions such as police overtime and expenses for public safety precautions such as a platform, holding the latter to be unconstitutional because religious activities took place in connection with those expenditures, injects a totally new and injurious standard into the constitutional analysis of the balance which must be struck between the Establishment Clause and the Free Exercise Clause in order to keep government neutral to religion instead of making government the enemy of religion (See Part III, *infra*).

II. The decision of the Court of Appeals fosters increased entanglement of church and state over the provision of normal governmental services and thereby violates the First Amendment.

The majority opinion in the Court of Appeals found that City expenditures on the platform unconstitutionally entangled the government and religion because of the close contact between the City and Archdiocese in planning for the papal visit, including the exclusive distribution of tickets by the Archdiocese. In fact, as pointed out by Judge Aldisert in his dissent below, the majority opinion in the Court of Appeals raises much more serious entanglement concerns than the City's conduct here (Appendix, p. 45a).

Considering the City's public safety concerns, it is not surprising that there would be some contact between the City and the Archdiocese regarding the Pope's visit. If the minimal contacts here are sufficient for entanglement, a ridiculous situation would be created, in effect prohibiting all contact between government and church officials. As the District of Columbia Circuit Court of Appeals held in *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979), "similar meetings and preparation would be

conducted for any group of similar size." As Judge Aldisert points out in his dissenting opinion below, what the majority analysis fails to establish is that any substantial increase in contact arose from the construction of the platform over what would have occurred had the City expended no money other than for police escorts and police protection (Appendix, p. 51a). Similarly, the distribution of tickets would seem the normal province of the Archdiocese and has been held by another court to be exactly that. *Baird v. White*, 476 F. Supp. 442 (D. Mass. 1979). There was no evidence that any citizen could not obtain tickets from the Archdiocese.

The majority opinion in the Court of Appeals also finds entanglement from divisiveness generated by the expenditures. Any risk of divisiveness was diminished because of the one-time nature of these expenditures. See *Roemer v. Board of Public Works of Maryland*, *supra*, at 765-66. The number of plaintiffs has never been an accurate index of political divisiveness and should not be, for the very purpose of courts is dispute resolution. The mere filing of a lawsuit does not connote the extreme political or religious divisiveness with which the drafters of the first amendment were familiar.

Contrast the entanglement found by the majority opinion in the Court of Appeals with the entanglement necessitated by their own analysis. The distinction urged by plaintiff-taxpayers between the Logan Circle platform and the Airport platform where the Pope pronounced a blessing requires the City to evaluate "the religious context of a religious organization (and) is fraught with the sort of entanglement that the constitution forbids." *Lemon v. Kurtzman*, *supra*, at 620. It requires a court to engage "in searching, therefore, impermissible inquiry into church polity." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976) (Appendix, p. 52a). Government officials should not be in the business

of reading advance texts of the Pope's comments before determining whether or not normal City services would be provided. Yet what plaintiff-taxpayers have advanced here is that the City may provide such services in connection with a speech but not in connection with a Mass. This reasoning would cover police overtime as well as a platform. It is no answer to say that City officials knew in advance that the platform would be used for a Mass. Decisions regarding the provision of security services should be based entirely on secular considerations, not on the character of the religious activity. As Judge Aldisert points out in his dissenting opinion, there could be extremely far-reaching implications if the government were forced to evaluate whether or not foreign aid to countries like Israel was going to be used in a way that would advance the Jewish religion (Appendix, p. 53a).

There is increasing concern as government grows about intrusions by government into religious policy-making. By holding that government should consider the nature of the activities of religious groups in determining whether or not to provide normal government services, the majority opinion in the Court of Appeals below has injected a new and dangerous element into the calculus which necessarily will impermissibly entangle government with religion. The majority opinion in the Court of Appeals invites an unprecedented intrusion into religious activities under the guise of Establishment Clause concerns.

III. The decision of the Court of Appeals, by denying normal government services on the basis of the character of speech contemplated in connection with those services, violates the first amendment and is in conflict with the recent decision of the Eighth Circuit Court of Appeals in *Chess v. Widmar* and the recent decision of the District of Columbia Court of Appeals in *O'Hair v. Andrus*.

The First Amendment directly recognizes that freedom of religion requires both that the government not

actively foster a particular religion nor directly interfere with any religion. A citizen is equally unfree if the state says "you have to be a Catholic" or "you can't be a Catholic."

But a total separation of church and state is impossible. Man has a religious nature. As Justice Douglas stated in *Zorach v. Clauson, supra*, at 313 (1952), we "are a religious people, whose institutions presuppose a supreme being." Accordingly, the Supreme Court has consistently rejected the concept that governmental action which merely benefits religion violates the First Amendment. *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976); *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970); *Wolman v. Walter*, 433 U.S. 229 (1977); *Zorach v. Clauson*, 343 U.S. 306 (1952).

Distinguishing between state action which unconstitutionally fosters religion and state action which merely benefits religion can be an extremely delicate task, because the courts have recognized that to err in either direction can constitute unjustified state interference in religion. *Walz v. Tax Commission, supra*, at pages 669-670. To support a particular religion constitutes interference with the free exercise of other religions. To attempt to deny any benefit to religion from state action sets up the state as the enemy of all religions and prevents the free exercise of religion. *Zorach v. Clauson, supra*, at page 306.

The denial of governmental service on the basis of the religious activity which was to take place in connection with that service runs directly counter to the Free Exercise Clause of the First Amendment. Concern for

the Free Exercise Clause in ascertaining the scope of the Establishment Clause is quite evident in the Supreme Court decisions cited above and most recently in the decision of the U.S. Court of Appeals for the District of Columbia in the case of *O'Hair v. Andrus, supra*. That action arose from the Pope's planned visit to Washington, D.C. on October 7, 1979. Plaintiff sought to enjoin the use of the National Mall for the celebration of Mass by Pope John Paul II until such time as the Roman Catholic Archdiocese of Washington guaranteed that it would pay the United States for all funds expended in support of the activity in the mall, including police protection, construction and removal of fences and barriers, the provision of electricity and other utilities, and maintenance and trash removal. The Court of Appeals upheld the order of the District Court denying plaintiffs' request for an injunction, quoting with approval the District Court's statement that, "the department of the interior is extending to the Archdiocese no greater access, uses, facilities, or support than would be extended to any other group, religious or non-religious." *O'Hair v. Andrus, supra*, at 934.

In Washington, D.C the Archdiocese voluntarily paid the cost of the platform on which the Mass was performed so that was not at issue there. But the principle reiterated by the Court in *O'Hair v. Andrus* is very much at issue here. That principle is that it offends the Free Exercise Clause of the First Amendment if the state will not provide the same services for a religious gathering, even a Mass, as it would provide for a non-religious gathering of the same size and scope. The Court in *O'Hair v. Andrus, supra*, stated:

> "to strike down a regulation rooted in neutrality so as to deny access to the Pope for a Mass-cum-sermon would thwart First Amendment values underlying communication and religious freedom" (at p. 937).

The importance of *O'Hair v. Andrus* is that it demonstrates a constitutional underpinning, the Free Exercise Clause of the First Amendment, for government expenditures in connection with a religious service. The issue here which was not before that court is exactly which expenditures are consistent with the First Amendment and at what point such expenditures should be held to constitute "establishment" of religion.

The majority opinion in the Court of Appeals below attempted to deal with this issue by stating that "the question then is whether the Archdiocese would have a colorable claim against the City for reimbursement if the City had declined the challenged assistance" (Appendix, p. 36a). As the majority opinion points out, such a claim would obviously be without merit, but that is not the argument here. The City of Philadelphia in the exercise of its discretion could have determined not to provide the platform because it believed that the platform was not necessary for public safety or because it believed it would be too expensive or for any number of secular reasons. However, it could not decide that the platform could not be provided merely because religious activities were to take place on the platform. Such a decision would not be neutral to religion, it would be hostile to religion. This area of discretion between the mandates of the Establishment Clause and the Free Exercise Clause has been specifically recognized by the Supreme Court. As important as the Free Exercise Clause considerations are, it is not necessary, in order to find that the Establishment Clause was not violated, for this Court to find that the Free Exercise Clause requires the platform. The U.S. Supreme Court points out in *Walz v. Tax Commission, supra,* at page 673:

> "The limits of permissible state accommodation to religion are by no means coextensive with the non-

interference mandated by the free exercise clause. To equate the two would be to deny a national heritage with roots in the revolution itself."

The majority opinion in the Court of Appeals attempts to distinguish *O'Hair v. Andrus, supra,* on the grounds that the services provided to the Pope at the National Mall "had been regularly provided to every major demonstration raising First Amendment values, such as the inhabitants of "resurrection city," the anti-war protestors at the moratorium, and recently the farmers who brought their tractors in protest to Washington" (Appendix, p. 36a). In this case the evidence shows that the City traditionally built platforms for visiting dignitaries. The Pope's platform was on a grander scale, but as pointed out earlier, this scale was related to legitimate secular purposes involving public safety and the promotion of the city.

The reasoning of the majority opinion in the Court of Appeals below conflicts directly with a recent opinion in the Eighth Circuit Court of Appeals. *Chess v. Widmar,* No. 80-1048 (8th Cir., Slip Opinion dated August 4, 1980, rehearing denied September 19, 1980) (petition for certiorari granted, 49 LW 3595). In *Chess* the Eighth Circuit Court of Appeals held that the University of Missouri at Kansas City (UMKC) cannot prohibit a recognized student group from using university facilities to hold religious services, reversing the District Court. The District Court in *Chess* had characterized the issue as "whether the university's ban on religious activities in university-owned buildings is required by the establishment clause of the First Amendment." *Chess v. Widmar,* 480 F. Supp. 907, 914 (W.D. Mo. 1979). The District Court determined that a neutral policy accommodating all student groups in their use of the university's facilities would clearly reflect a secular legislative purpose and would avoid excessive entanglement of religion. But analogizing the facts to those faced by the Supreme Court in

Tilton v. Richardson, 403 U.S. 672 (1971), the District Court found that a "university policy permitting regular religious services in university-owned buildings would have the primary effect of advancing religion," and concluded "that the university's present ban on religious services in its buildings is required by the establishment clause."

The Eighth Circuit Court of Appeals made various points in reversing the District Court decision which are highly relevant to the analysis of this case. First, the Court pointed out that religious speech, like other speech, is protected by the First Amendment. *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). It is also fundamental that equal access to a public forum cannot be restricted because of the content of the message.

> "Under the equal protection clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favorite or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others assembling or speaking on the basis of what they intend to say. Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone. *Carey v. Brown*, 48 U.S.L.W. 4756, 4758 (June 20, 1980) (No. 79-703) (quoting *Police Dept. v. Mosley*, U.S. 92 (1972)).

In the present case, content alone, the fact that the platform was used for a religious service, was relied upon by plaintiff-taxpayers as well as the majority of the Court of Appeals as the basis for a finding that the establishment clause had been violated.

In *Chess, supra,* the University of Missouri at Kansas City (UMKC) had agreed that a neutral policy permitting any student group to meet in university-owned buildings for any purpose regardless of religious affiliation, would reflect a clear secular purpose. But the concern was that a neutral policy would be impermissible because it would have the primary effect of advancing religion. The Court of Appeals pointed out that rather than advancing religion, a neutral policy has the primary effect of advancing the universities' admittedly secular purpose—to develop students' "social and cultural awareness as well as (their) intellectual curiosity." The Court of Appeals stated furthermore, a neutral policy would not be an "establishment" as that term was understood by the framers of the First Amendment. "(F)or the men who wrote the religious clauses . . . the "establishment" of a religion connoted sponsorship, financial support, and active involvement of the sovereign and religious activity." *Walz v. Tax Commission, supra,* 397 U.S. at 668. Under a neutral policy the UMKC would not sponsor religious worship or teaching; sponsorship would lie with the recognized student groups. Financial support would be minimal. Finally, there would be no active involvement of the sovereign because the university's role would be limited to determining the time, place and manner of the event and not extend to approval or disapproval of content." The Eighth Circuit Court of Appeals pointed out that in contrast to the neutral policy, the UMKC's regulation had the primary effect of inhibiting religion, which violated the First Amendment.

The Court also pointed out that the UMKC's prohibition on worship and religious teaching hopelessly entangles it in the delicate task of defining religion, determining whether a proposed event involves religious worship or teaching, and then monitoring events to make sure that no prohibited activity takes place. These would be particularly difficult tasks in our contemporary society. This is exactly the concern expressed by Judge Aldisert in his dissenting opinion in the Court of Appeals below (See Part II *infra*).

Then the Eighth Circuit Court of Appeals quoted from Judge Leventhal's opinion in *O'Hair v. Andrus, supra,*

> "Noting that the Free Exercise Clause 'compels government to make *some* accommodation to religious realities and needs,' Judge Leventhal found that 'equal access to a public facility generally open to the public,' was such an accommodation. Id. at 935 (emphasis in original, footnote deleted). Judge Leventhal then concluded that "(S)o long as government aid goes no further than arguably required by (the accommodation) principle, there is no violation of the separation required by the Establishment Clause." Id. (footnote deleted). See also *Sherbert v. Verner*, 374 U.S. 398 (1963)."

The Eighth Circuit Court of Appeals then disposed of the argument that the case was controlled by *Tilton v. Richardson, supra,* which was the ultimate refuge of the majority in the Court of Appeals below in this case (Appendix, pp. 32a-33a):

> "The concern of the Court in *Tilton* was with the potential that a sectarian college would be granted exclusive control of a government-financed building on its campus could devote that building to its own

religious purposes. Here, however, there is no question that UMKC continues to control those buildings and devotes them to secular purposes. There is no *Tilton* problem simply because the use of a student forum provided by a university turns, from time to time, to religious activities as well as political, cultural and social ones. The neutral accommodation by a public university of students whose activities are religious is far different than the total dedication of government-funding buildings to the sectarian institution for sectarian purposes" *Chess v. Widmar, supra,* p. 22.

The concern about *Tilton* in this case should be much less than in the *Chess* case. Here the platform was a one-time event that was used only for several hours on one day and was dismantled within a week. To equate the potential effect of the government expenditure here with what the Court was concerned about in *Tilton* is totally unreasonable.

The granting or denial of governmental services which might benefit religion cannot be based on the content of the speech. Therefore, expenditures on the Pope's platform cannot be unconstitutional simply because the platform was used to perform a Mass. They can only be unconstitutional if they are not reasonably related to such secular purposes as security and crowd safety. This requires an analysis of whether the secular purposes advanced by the City were really being served by the platform. Judge Broderick in the District Court specifically stated that he did not doubt the sincerity of the City's purposes. However, he held, and the majority in the Court of Appeals affirmed, that the religious nature of the activity on the platform required a finding that the expenditures violated the establishment clause. Such analysis runs afoul of the Free Exercise Clause. It

conflicts with the analysis of the District of Columbia Court of Appeals in *O'Hair v. Andrus, supra* and the Eighth Circuit Court of Appeals in *Chess v. Widmar, supra*. The proper analysis in the Courts below should have been, "Are the expenditures reasonably related to the City's secular purposes?" Obviously, the City could have gone too far. But does the First Amendment require that a platform for the Pope be short, rickety, with scaffolding exposed, painted black and surrounded by weeds, just so it would not look to anyone like an outdoor church? The District Court and the majority in the Court of Appeals evidently believed that the setting was too "splendid" and "magnificent." But what elements provided by the City led to this splendor and magnificence? If there were such elements, these and only these should have been unconstitutional. Instead the lower Courts erred by basing their finding of unconstitutionality strictly on the character of the activity performed, the content of the speech, the Mass. In doing so the majority opinion of the Court of Appeals conflicts directly with the opinion of the Eighth Circuit Court of Appeals in *Chess v. Widmar, supra*, and accordingly with the First Amendment.

CONCLUSION

The decision in the Court of Appeals was wrong. The majority opinion finds the platform too "splendid" to comport with the City's secular purposes of crowd safety and promoting the City but then invalidates all expenditures on the platform except those for reusable items, whether or not the expenditures were related to the secular purposes or the splendor. The majority opinion, by focusing on the character of the religious activities which took place in connection with the platform as the basis for finding a violation of the Establishment Clause, injects a new and dangerous element into the analysis of the proper relationship between church and state. This analysis fosters entanglement of church and state and conflicts with recent Circuit Court of Appeals opinions in the Eighth and District of Columbia Circuits regarding the Free Exercise Clause of the First Amendment.

For the reasons stated above, a Writ of Certiorari should issue to review the judgment and the opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

/s/ T. Michael Mather
T. MICHAEL MATHER
Chairman, Litigation Department

/s/ Alan J. Davis
ALAN J. DAVIS
City Solicitor

APPENDIX

MEMORANDUM OPINION AND ORDER OF JUDGE BRODERICK, DATED NOVEMBER 9, 1979

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 79-3377

SUSAN JANE B. GILFILLAN, et al.

vs.

CITY OF PHILADELPHIA, et al.

MEMORANDUM

BRODERICK, J. November , 1979.

Never before in the history of the City of Philadelphia have a million people peacefully assembled to hear a man of God proclaim the gospel of love and man's need to live with freedom and dignity. The visit of Pope John Paul II on October 3 and 4, 1979 brought a unique honor to the City of Philadelphia and inspired feelings of fellowship and good will which transcended all sectarian lines. The officials of the City of Philadelphia are to be commended for the beautiful setting which they created for this historic event, and for the skillful planning and management which permitted the vast crowd to assemble in safety and comfort.

The issue before this Court, however, involves only one narrowly defined aspect of the Pope's visit to Philadelphia. Plaintiffs have clearly stated from the outset that they do not challenge the celebration of a Roman Catholic Mass on public property; nor do they contest expenditures for security and crowd control required for the visit of any public figure of the Pope's stature. The issue presented to this Court is whether or not the Constitution of the United States permits the expenditure of public funds by the City for the construction and preparation of the platform which served as a base for the altar used by the Pope and the clergy in the celebration of the Mass before approximately one million people assembled at Logan Circle.[1] This is not a "religious" issue but an issue of Constitutional law.

This issue was initially presented to the Court as a motion for a temporary restraining order and preliminary injunction. At a meeting in chambers attended by counsel for all the parties on September 19, 1979, the City represented that the platform was at that time 75% completed and that the Archdiocese of Philadelphia had agreed with the City that, in the event the final judgment was for the plaintiffs, the Archdiocese would reimburse the City for all costs incurred in the construction of the platform. It was agreed by the parties that the City should complete the construction of the platform so that there would be no disruption of the plans for the Pope's visit on October 3 and 4, 1979. It was also agreed that the Court would enter an Order, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, advanc-

1. Public funds were expended for labor and materials used to construct the platform and to provide shrubbery, trees and flowers surrounding the platform, together with an amplification system, carpeting and seating. Public funds were *not* expended for the Pope's chair or the altar, which were provided by the Archdiocese.

ing the trial of the action on the merits and consolidating it with the hearing on the preliminary injunction motion, and that the hearing would be scheduled for October 9, 1979.

The original plaintiffs are Susan Jane B. Gilfillan and the Reverend Mary Anne Forehand, both taxpayers of the City of Philadelphia. Their standing as taxpayers under the First Amendment religion clauses is well established. *Flast v. Cohen*, 392 U.S. 83 (1968). The Court granted defendants' unopposed motion to join the American Civil Liberties Union and the National Ministries, American Baptist Churches in the United States of America as parties plaintiff. On the day of trial, Reverend Walter Weider, Reverend Bryan Kopke, Bertha R. Smith, Herbert S. Herrman, Gerard H. Bye, Antoinette Montanaro, Elizabeth M. Calter, Martha Walker Miln, Paul H. Fox and Janice Schulte sought to intervene as parties plaintiff pursuant to Federal Rule of Civil Procedure 24(a). These applicants for intervention raise claims identical to those of the original plaintiffs, but, in addition, they raise claims involving equal protection under the Fourteenth Amendment and the City's alleged expenditures for the Mass celebrated by the Pope at the Civic Center on October 4. The Court finds that these applicants for intervention have not met the requirements for intervention of right pursuant to Rule 24(a), in that the original plaintiffs adequately represent applicants' interests as to the claim concerning the constitutionality of the expenditure of public funds for the platform. The evidence presented to the Court concerns only the platform expenditures. No evidence was presented on the equal protection issue nor on the issue of the City's alleged expenditures in connection with the Mass at the Civic Center on October 4. Therefore, the disposition of the issues raised by the original plaintiffs will not impair or impede the ability of these applicants

to present their equal protection claims and their claims concerning the Mass at the Civic Center in a separate action. The Court will, however, grant applicants permission to intervene pursuant to Rule 24(b) as to those claims raised by the original plaintiffs, since these applicants for intervention are taxpayers of the City of Philadelphia and their claims concerning the platform are identical to the claims raised by the original plaintiffs.

Evidence was presented and the Court heard oral argument on October 9, 1979. For the reasons hereinafter set forth, the Court will enter a judgment for plaintiffs declaring to be unconstitutional under the First Amendment "establishment" clause the expenditure of taxpayer's funds for labor and materials employed in constructing, decorating, and dismantling the Logan Circle platform, and for such associated costs as carpeting, seating, sound amplification, trees, shrubbery and flowers. The City will be ordered to obtain reimbursement of such costs from the Archdiocese of Philadelphia pursuant to its agreement with the Archdiocese.

The facts of this case are largely uncontested. The parties have stipulated that on October 3, 1979 the Pope, assisted by approximately forty bishops, celebrated Mass on a platform constructed by the City of Philadelphia at Logan Circle. During the course of the Mass, Communion, a sacrament of the Roman Catholic Church, was distributed to approximately 250,000 persons. The platform upon which was placed an altar and a large cross was designed by staff architects employed by the City in the Department of Public Property. The platform completely covered the Swann Fountain in Logan Circle.[2] Its base was cylindrical in shape, 28 1/2 feet high and

2. A photograph of the architect's rendering of the platform is appended to this Memorandum.

144 feet in diameter. On the northwest axis of the Benjamin Franklin Parkway, the City constructed 57 steps, 60 feet wide and extending 110 feet northwest from the platform to the street level. A red carpet, owned by the City, was extended along the length of the staircase. In the center of the platform the City built a 16 step four-sided pyramidal structure, 45 feet on a side and 14 feet high. Atop this pyramid was a smaller, five-step pyramid upon which was placed the chair in which the Pope sat. The top of the pyramid was carpeted. The City painted the platform white, and surrounded it with flowers and shrubs. The City also furnished 20,000 chairs and constructed an enclosure for them. The Papal Mass was amplified by a City-owned public address system consisting of 115 loudspeakers and installed at taxpayer's expense by City workers along the Parkway. A 36 foot high Christian cross was erected on the platform; it was in place and lighted at night for six nights prior to the ceremony. The platform was used only for the open-air Mass. It remained in place for a week so that visitors could view it and was then dismantled.

In addition to the stipulation of facts, the plaintiffs presented the testimony of Robert Silver, the Commissioner of Public Property of the City of Philadelphia. He testified that the platform was designed by City architects, and, although officials of the Archdiocese approved the design, they did not participate with the architects in the actual planning. Commissioner Silver testified, however, that, from the inception of the planning process, it was understood by City officials that the platform was to be used for the celebration of a Roman Catholic Mass. He said that the City's purpose for constructing a high platform was to ensure the safety of the Pope and the crowd, as well as to make the Pope visible to the assembled gathering.

Plaintiffs also presented witnesses who testified that a ticket was required for access to the immediate area surrounding the platform.[3] The evidence presented by the plaintiff was not controverted by the defendants. It is uncontested that the only persons present on the platform during the celebration of the Mass by the Pope were Roman Catholic clergy and lay people who participated in the service. Civil officials were not present on the platform; the Governor, the Mayor and other public officials greeted the Pope upon his arrival at the airport.

Plaintiffs contend, therefore, that the platform was planned, prepared and used exclusively for a religious service, a Roman Catholic Mass celebrated by the Pope, assisted by the clergy, and that the expenditure of public funds for such a religious service is forbidden by the establishment clause of the First Amendment to the United States Constitution. On the other hand, the defendants contend that, although the platform was used for a religious service, the City had no religious purpose in constructing it. It is the City's position that the Pope is an international dignitary and head of state,[4] and, in view of the extraordinary public interest in seeing and hearing him, the City planned and constructed the platform in the interest of the Pope's security, the safety of the crowd and the maximum possible access for those who wished to see and hear the Pope. The Court does not question the sincerity of the City's expressed reasons for building the platform at Logan Circle in preparation for this extraordinary event. However, the First Amendment to the Constitution of the United States has consistently been interpreted in letter and in spirit as pro-

3. Plaintiffs raise the issue of access to the area only insofar as it is relevant to the characterization of the event as religious or secular.

4. The Pope's status as head of state is not relevant to the Constitutional issue before the Court. A religious service conducted by a head of state is nonetheless a religious service.

hibiting the expenditure of public funds for a religious service.

The language of the First Amendment can best be interpreted in the context of the history of its inception. *See Everson v. Board of Education*, 330 U.S. 1 (1947). The Virginia Declaration of Rights of 1776 asserted the principle of religious freedom, although Patrick Henry and many other Virginians felt at the time that all religions should be tax-supported. Public opinion was aroused to the contrary, however, in 1785 by James Madison's "Remonstrance Against Religious Assessments". The Statute of Religious Freedom, drawn up by Thomas Jefferson and enacted by the Virginia Senate in 1786, prohibited taxation for a religious purpose. The Constitution of the United States, drafted in Philadelphia in 1787, did not include a Bill of Rights. There was considerable opposition to ratification of the Constitution, particularly in Virginia, because it did not contain a Bill of Rights. Madison, who was originally opposed to the incorporation of a Bill of Rights in the Constitution, changed his position and presented twelve proposed amendments to the Constitution to the First Congress which met in New York in 1789. Ten of these amendments, our Bill of Rights, were ratified by the States in 1791. As Mr. Justice Frankfurter commented in *McGowan v. Maryland*, 366 U.S. 420, 465 (1961):

> What Virginia had long practiced, and what Madison, Jefferson and others fought to end, was the extension of civil government's support to religion in a manner which made the two in some degree interdependent, and thus threatened the freedom of each.

The First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof . . ."[5] While tensions inevitably arise in the application of the "free exercise" and "establishment" clauses,[6] the Framers of the Constitution regarded the interaction of the two clauses as essential to the separation of church and state. This wall of separation was determined by them to be necessary to the preservation of both religious and governmental freedom. *See Tribe* at 812-19. A violation of the principle of separation of church and state has been said to create the danger of "destroying] government and degrad[ing] religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

Indeed, the Framers recognized that the power of government to aid or "establish" religion also embodies the power to destroy or impede its "free exercise". Justice Rutledge, dissenting in *Everson*, *supra*, 330 U.S. at 53-54, eloquently expressed this principle:

> The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Par. 6, 8. The great condi-

---

5. The religion clauses apply to state action through their incorporation into the Fourteenth Amendment Due Process Clause. Cantwell v. Connecticut, 310 U.S. 296 (1940); Everson v. Board of Education, 330 U.S. 1 (1947); *see* Abington School District v. Schemmp, 347 U.S. 203, 253-58 (1962).

6. *See* Tilton v. Richardson, 403 U.S. 672, 678 (1971). Perhaps the best example of such tension is found in the Sunday closing law cases which presented a free exercise issue as to persons whose religions forbade work on Saturday, and an establishment issue as to the selection of Sunday as the day of rest. *See* L. Tribe, American Constitutional Law 815 (1978) [hereinafter Tribe].

tion of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting. *Id.*, Par. 7, 8. Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. *Id.*, Par. 8, 11. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. *Ibid.* The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions. *Id.*, Par. 11. (footnotes omitted).[7]

Aside from such free exercise implications as may accompany any establishment claim, there is no free exercise of religion issue before the Court. The sole question presented is whether the challenged expenditures constitute an establishment of religion forbidden by the First Amendment.

The Supreme Court's first major decision construing the establishment clause was *Everson*, *supra*. Mr. Justice Black, writing for the majority, stated:

> The "establishment of religion" clause of the First Amendment means at least this: . . . No tax in any

7. Madison's predictions about the competition of various religious sects for a share of public funds have been borne out in this case in that applicants for intervention, members of various religious groups, have sought to raise equal protection claims that they have not been afforded assistance equivalent to that received by the Catholic Church.

> amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, the clause against establishment of religion was intended to erect "a wall of separation between Church and State". 330 U.S. at 15-16.

Since *Everson*, it has become evident that the "wall of separation between church and state" is sometimes difficult to define with precision. Nonetheless, in the thirty years since *Everson*, the Supreme Court has clearly defined a three-pronged test which governmental assistance must pass in order to meet the requirements of the establishment clause; (1) there must be a secular purpose, (2) the primary effect must neither advance nor inhibit religion, and (3) it must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *See also Wolman v. Walter*, 97 S.Ct. 2593 (1977); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976); *Meek v. Pittinger*, 421 U.S. 349 (1975); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Walz v. Tax Commissioner of the City of New York*, 397 U.S. 664 (1970); *School District of Abington Twp. v. Schemmp*, 374 U.S. 203 (1963); *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973). The law or act in question must fulfill all three of the above requirements in order not to violate the establishment clause.

The requirement of a secular purpose has rarely been, in itself, determinative of establishment clause claims. *See Tribe* at 835-36. Nonetheless, the assertion of an incidental secular purpose does not save an action which in other respects violates the establishment clause. "The Constitutional prohibition always could be brought to naught by adding a modicum of the secular." *Everson, supra*, 330 U.S. at 47. We find that, under the facts pre-

sented in this case, the actions of the City of Philadelphia in constructing and decorating the platform amount to public sponsorship of a religious service. The secular purposes expressed by the City are incidental to this non-secular purpose. The beauty of the service, and its appeal to millions of people, Catholics and non-Catholics alike, cannot overcome the fact that the expenditure of public funds for items necessary[8] to the service crossed the "wall of separation" mandated by the Constitution.[9]

City architects designed the platform, the most prominent feature of which was a 36 foot high cross, the most sacred symbol of the Catholic faith. City officials knew from the time that they began to plan the structure that it would be used for the celebration of a Roman Catholic Mass. The design and structure of the platform emphasizes its religious nature. The City in effect ceded control of the Logan Circle area to the Archdiocese of Philadelphia, which had the sole responsibility for distributing tickets for admission to area in the vicinity of the platform.

The City contends that its purpose in constructing the platform was to protect the Pope and the assembled crowds, and to make the Pope visible to the largest possible number of people. There is no question that the platform did protect the Pope and the crowd, and it did make the Pope visible to a crowd estimated at one million. The fact remains, however, that the platform itself was not designed, constructed, or used for a civil ceremony of welcome but was designed, constructed, and

---

8. The argument that the platform was only a "foundation" for the religious accoutrements has no merit.

9. "Good motives cannot save impermissible actions". Allen v. Morton, 495 F.2d 65, 72 (D.C. Cir. 1973).

used for the celebration of Holy Mass by the Pope, assisted by bishops of the Catholic Church. The platform, which was a thing of beauty, was crowned by a 36 foot cross.[10] Access to the area immediately adjacent to the platform was limited to those who had received tickets distributed by the Archdiocese. A large number of these ticketholders were direct participants in the Mass in that they received Communion distributed by the priests who moved through the crowd. On the basis of the evidence presented, this Court finds that the platform was designed, constructed, and used for a religious service and only incidentally for the secular purposes asserted by the City.

Having determined that the platform was designed, constructed and used for a religious purpose, and only incidentally for a secular purpose, it is apparent that the first part of the Supreme Court's test has not been satisfied. On this basis alone, the Court could find that the expenditure of public funds for the platform constitutes an establishment of religion in violation of the First Amendment. We shall, nevertheless, consider whether the use of public funds for the platform violates the second and third parts of the Supreme Court's three-pronged test. The second part of the test requires that the government assistance in question have a secular effect, i.e., that its primary effect must neither advance nor inhibit religion. The Supreme Court has most often dealt with the secular effect issue in the context of government aid to church-related schools.

In 1971 in the case of *Tilton v. Richardson*, *supra*, the Supreme Court held that a federal statute which pro-

---

10. When the mere display of a cross was at issue, not even, as here, in the context of a religious service, courts have found establishment clause violations. Fox v. City of Los Angeles, 587 P.2d 663 (Cal. 1978); Lowe v. City of Eugene, 463 P.2d 360 (Ore. 1969).

vided grants for church-related colleges and universities was unconstitutional insofar as it left open the possibility that a building constructed with federal aid might, twenty years later, be used for religious purposes. Chief Justice Burger wrote for the plurality that the mere possibility of sectarian use of government-funded buildings imbued the initial expenditure with the "primary effect"[11] of advancing religion:

> Although we reject appellant's broad constitutional arguments we do perceive an aspect in which the statute's enforcement provisions are inadequate to ensure that the impact of the federal aid will not advance religion. . . . Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. . . . If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion. 403 U.S. at 682-683.

In 1973, the Court held that a statute providing for grants to nonpublic schools for the "maintenance and repair of school facilities and equipment to ensure the health, welfare and safety of enrolled pupils" was unconstitutional because a religious school *might* use the funds to pay for heating and lighting the school chapel or classrooms in which religion was taught. *Committee for Public Education and Religious Liberty v. Nyquist, supra.* Although the Court found that the statute passed the first part of the three-pronged test, the Court held that it

---

11. The Supreme Court has more recently spoken of the primary secular effect requirement in terms of a requirement that any non-secular effect be remote, indirect, and incidental. *See* Tribe at 840. For our purposes in this case, we do not find this distinction to require a different analysis.

had a "primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools." *Id.*, 413 U.S. at 774.

Other Supreme Court decisions demonstrate even more clearly that the establishment clause prohibits assistance which results in even remote and indirect aid to religion: *Lemon v. Kurtzman, supra* (reimbursement to nonpublic schools for the cost of teaching mathematics, modern foreign languages, and the physical sciences); *Abington v. Schemmp, supra* (the reading of ten verses of the Bible and the saying of the Lord's Prayer in the public schools); *Engel v. Vitale, supra* (in-class recitation of "nondenominational" prayer prepared by the New York Board of Regents); *Tudor v. Board of Education*, 14 N.J. 31 (1953); *cert. denied*, 348 U.S. 816 (1954); (free distribution of the Gideon Bible in public schools); *McCollum v. Board of Education*, 333 U.S. 203 (1948) (released time program in which regular classes ended one hour early one day each week so that religious instruction might be given in the public classrooms).

An analysis of the above decisions of the Supreme Court leaves this Court no alternative but to conclude that the use of public funds under the circumstances heretofore described had the primary effect of advancing religion and thus violated the establishment clause.

Finally, we will consider the third part of the Supreme Court's three-pronged test: whether the assistance fosters an excessive entanglement of government with religion. In other words, did the City's construction of the platform upon which the Pope said Mass result in an impermissible entanglement of government and religion? The Supreme Court has discussed the concept of "entanglement" in several contexts. *See generally, Tribe* at 865-880. In one sense, an impermissible entanglement might be the necessity of constant monitoring by the state of

the administrative activities of a religious enterprise. *See Lemon v. Kurtzman, supra.* That type of entanglement is not present in the instant case.

A second type of entanglement is the participation of governmental officials with church officials in the planning for a religious function, such as was found unconstitutional in *Allen v. Morton*, 495 F.2d 64 (D.C. Cir. 1973). There, the Christmas Pageant of Peace in Washington, D.C., particularly the inclusion in the Pageant of a life-sized creche, was found unconstitutional because federal officials participated in the planning and organizing committees, although there was no federal financial subsidy. Judge Tamm, in his concurring opinion, stated that the entanglement test requires "that Government involvement should be kept to a necessary minimum, and that there should be avoided not only the actual interference but also the potential for and appearance of interference with religion." *Id.* 495 F.2d at 75. In line with this reasoning, it would appear that the planning for the platform by City officials with the concurrence of Archdiocese officials constitutes an impermissible entanglement: Even if the City believed that, in providing the platform, it was promoting a secular purpose, what it actually did, in the words of Justice Brennan, was "employ the organs of government for essentially religious purposes." *Abington v. Schemmp, supra,* 374 U.S. at 231.

Finally, a factor which the Supreme Court has considered within the purview of the entanglement test is the tendency of the assistance in question to promote divisiveness among and between religious groups. This was recognized in *Everson*. *See* pp. 7-8, *supra.* The Court discussed the divisiveness issue at length in *Lemon v. Kurtzman, supra,* 403 U.S. at 622:

> A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. . . . Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith. Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.

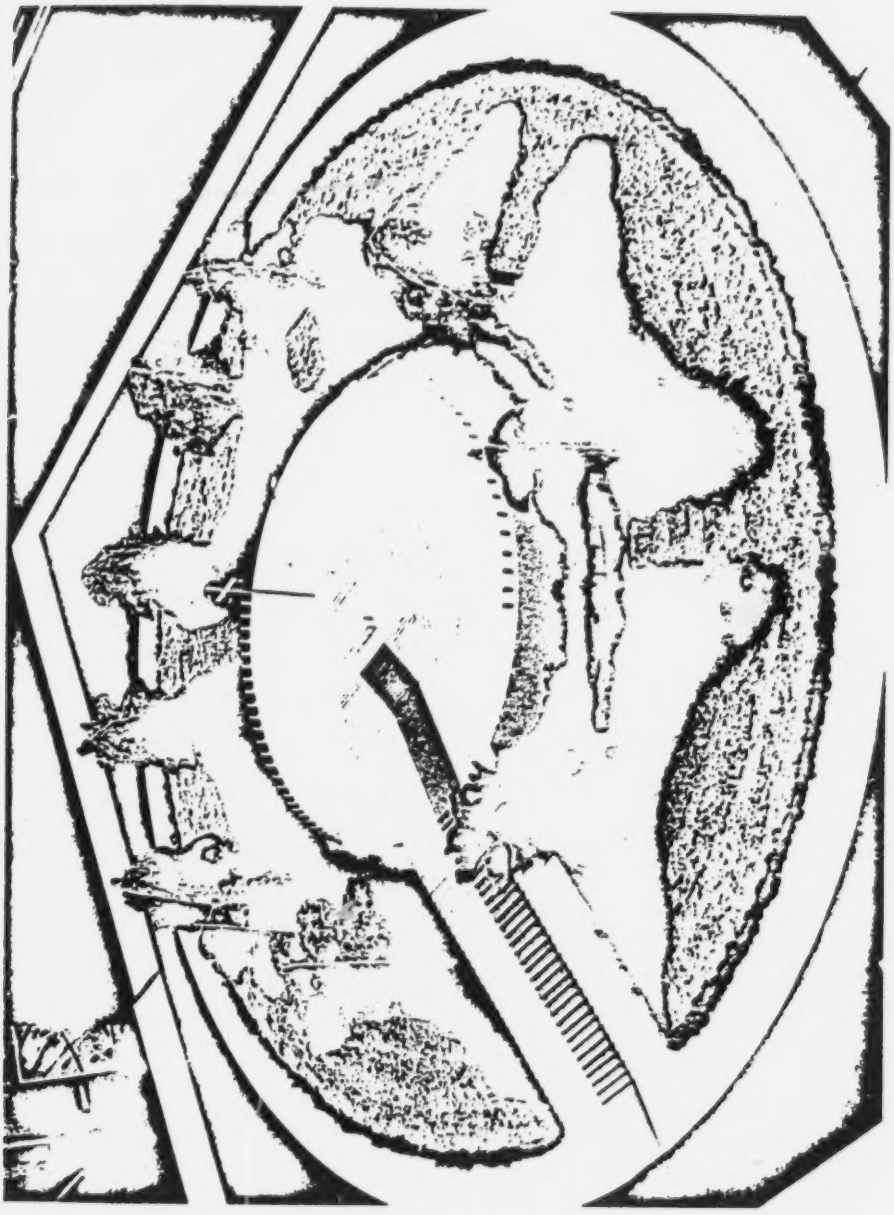
The danger that various denominations and sects would press demands for equal treatment was one of the grounds upon which ceremonial Bible reading in the public schools was held unconstitutional in *Abington v. Schemmp, supra*, 374 U.S. at 241-42. Such demands have already occurred in this case. *See* n. 7, *supra*.

Thus, we find that the City's expenditure of public funds for the construction and decoration of the platform upon which the Pope said Mass constitutes a violation of the establishment clause in that the actions of the City have failed all three tests — secular purpose, secular effect, and entanglement.

We now must determine the amount of public funds expended in connection with the platform. The parties are in general agreement as to most of the cost figures. The City requests that the Court consider the net cost, deducting the cost of those items which can be reused by the City. While we do not suggest that First Amendment violations can be absolved by reimbursing the government for unconstitutional expenditures, we do find

that, under the circumstances in this case, reimbursement of the City for the net cost is an appropriate remedy. The construction of the platform proceeded to completion by agreement of the parties. There is now no doubt that, had the Court proceeded with this case prior to the Pope's visit, the City would have been enjoined from completing the platform. We find that the net total of $204,569 is the amount which was unconstitutionally expended by the City, as detailed in the chart appended to this Memorandum. The City will be ordered to obtain reimbursement of this sum from the Archdiocese of Philadelphia pursuant to its agreement with the Archdiocese.

This Memorandum is in lieu of findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.



APPENDIX

ARCHITECT'S RENDERING OF THE PLATFORM

APPENDIX—COSTS

0EXPENDITURES

Lumber	$ 28,894	(Deposition of Robert Silver—ex. 2)
Bunting	2,618	(Deposition of Robert Silver—ex. 2)
Paint	2,785	(Deposition of Robert Silver—ex. 2)
Nails	300	(Deposition of Robert Silver—ex. 2)
Staging & Scaffolding	40,000	(Deposition of Robert Silver—ex. 2)
Chair Rental	12,000	(Deposition of Robert Silver—ex. 2)
Carpet	5,800	(Deposition of Robert Silver—ex. 2)
Shrubs & Flowers	48,860	(Deposition of Robert Silver—ex. 6)
Sound Equipment	55,950	(Deposition of Robert Silver—p. 16)
Park Commission Labor	31,276	(Deposition of Robert Silver—ex. 1)
Public Property Department Labor	67,114	(Deposition of Robert Silver—ex. 5, p. 7)
Architects & Engineers Labor	7,200	(Deposition of Robert Silver—ex. 1)
Labor—Dismantling	7,944	(Deposition of Robert Silver—ex. 1, 7, 8, 9,)
TOTAL	$310,741	(Deposition of Robert Silver—ex. 4)
		(Deposition of Robert Silver—p. 30; Deposition of Robert McConnell—pp. 6-7)

VALUE OF REUSABLE ITEMS*

Lumber	$ 28,894
Bunting	2,618
Sound Equipment	20,000
Shrubs & Flowers	48,860
Carpet	5,800
TOTAL	$106,172

*The Court has accepted the representations of City officials as to the value of reusable items with the exception of $5,950 for labor which was included in the sound equipment figure. See Deposition of Robert Silver, ex. 5, p. 7.

	$310,741
	106,172
NET COST	$204,569

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 79-3377

SUSAN JANE B. GILFILLAN, et al.

vs.

CITY OF PHILADELPHIA, et al.

ORDER

AND NOW, this 9th day of November, 1979, the Court, having found, for the reasons set forth in the Memorandum of this Court dated November 9th, 1979, that the expenditure of funds by the City of Philadelphia for the construction of the platform and its appurtenances in connection with the visit to Philadelphia of Pope John Paul II violated the First Amendment to the Constitution of the United States, hereby ORDERS that judgment is entered for the plaintiffs and against the defendant, City of Philadelphia; it is FURTHER ORDERED that the City of Philadelphia shall immediately take all necessary steps to obtain reimbursement of the sum of $204,569 from the Archdiocese of Philadelphia pursuant to its agreement with the Archdiocese of Philadelphia.

/s/Raymond J. Broderick
RAYMOND J. BRODERICK, J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 79-3377

SUSAN JANE B. GILFILLAN, et al.

vs.

CITY OF PHILADELPHIA, et al.

ORDER

AND NOW, this 9th day of November, 1979, the Court, having considered the motion to intervene as parties plaintiff pursuant to Federal Rule of Civil Procedure 24(a), filed by Reverend Walter [illegible]eider, Reverend Bryan Kopke, Bertha R. Smith, Herbert S. Herrman, Gerard H. Bye, Antoinette Montanaro, Elizabeth M. Calter, Martha Walker Miln, Paul H. Fox, and Janice Schulte, for the reasons set forth in the Memorandum of this Court dated November 9, 1979, hereby ORDERS that said motion is DENIED, it is FURTHER ORDERED that the above named applicants for intervention are granted permission to intervene pursuant to Federal Rule of Civil Procedure 24(b), only as to those claims raised by the original plaintiffs.

/s/Raymond J. Broderick
RAYMOND J. BRODERICK, J.

Dated November 14, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2786

GILFILLAN, Susan Jane B., REV. FOREHAND, Mary Anne

and

REV. WEIDER, Walter, REV. KOPKE, Bryan, SMITH, Bertha R., HERRMAN, Herbert S., BYE, Gerard H., MONTANARO, Antoinette, CALTER, Elizabeth M., MILN, Martha Walker, FOX, Paul H., SCHULTE, Janice,

Intervenors in District Court

v.

CITY OF PHILADELPHIA, MAYOR RIZZO, Frank L., MANAGING DIRECTOR LEVINSON, Hillel S., CITY REPRESENTATIVE LA SALA, Joseph A., COMMISSIONER OF PUBLIC PROPERTY SILVER, Robert, CITY OF PHILADELPHIA,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 79-3377)

Argued September 15, 1980
Before: ALDISERT, ROSENN and GARTH, *Circuit Judges*

(Opinion Filed December 30, 1980)

ALAN J. DAVIS,
City Solicitor
T. MICHAEL MATHER, (Argued)
Chairman, Litigation Department
1500 Municipal Services Building
Philadelphia, Pennsylvania 19107
Attorneys for Appellant
City of Philadelphia

HENRY W. SAWYER, III, ESQUIRE (Argued)
EDWARD M. POSNER, ESQUIRE
1100 Philadelphia National Bank Building
Broad and Chestnut Streets
Philadelphia, Pennsylvania 19107
Attorneys for Appellees
Susan Jane B. Gilfillan and
American Civil Liberties Union,
Greater Philadelphia Branch

EARL W. TRENT, JR., ESQUIRE
American Baptist Churches Building
Valley Forge, Pennsylvania 19481
Attorney for Appellees
Rev. Mary Anne Forehand
and National Ministries,
American Baptist Churches in the U.S.A.

JOHN T. ACTON, ESQUIRE
726 Fitzwatertown Road
Willow Grove, Pennsylvania 19090
LEE BOOTHBY, ESQUIRE (Argued)
1310 St. Joseph Road
Berrien Springs, Michigan 49103
Attorneys for Intervenors

OPINION OF THE COURT

ROSENN, *Circuit Judge*.

On October 3, 1979, more than a million people came together at Philadelphia, Pennsylvania to hear Pope John Paul II offer Mass and deliver a sermon at the City's Logan Circle. The liturgical service, the largest event during the Pope's two-day visit to Philadelphia, generated an unprecedented outpouring of warmth and good will felt throughout the City for months following. No one disputes that the historic visit of the Pope had a lasting and beneficial effect on the people of Philadelphia. It also favorably enhanced the image of the City. This case, however, requires us to decide a narrow question of the constitutionality of the expenditure by the City of Philadelphia of more than $200,000 to construct a special platform and to provide other extraordinary assistance for the papal ceremonies at Logan Circle. Without reflecting in any way on the brilliant success of the Pope's visit to Philadelphia, what we must examine in this case is whether certain governmental actions by the City were permissible under the Establishment Clause of the first amendment of the Constitution.

I.

In September of 1979, Pope John Paul II, the temporal leader of the Roman Catholic Church, announced that he would undertake a "pastoral mission" to the United States and that his trip would include a stop in Philadelphia. City officials then began a series of meetings with the leaders of the Archdiocese of Philadelphia in preparation for the Pope's visit. Out of these meetings grew plans for a Mass at Logan Circle. In accordance with those plans, and with the approval of the Archdiocese, the City designed and built, over Swann Fountain in Logan Circle, a large platform to be used as the dais from which the Pope would celebrate Mass and distrib-

ute Holy Eucharist, a sacrament of the Roman Catholic Church, and bring his message to Philadelphia.

This challenge came shortly after the City announced its construction plans. Plaintiffs Susan Jane B. Gilfillan and Reverend Mary Anne Forehand, taxpayers of the City of Philadelphia, brought suit to enjoin the City from expending funds to build the platform for the Pope, alleging a violation of the first amendment's Establishment Clause.[1] With the approval of the district court, the parties stipulated to an order under which construction was allowed to proceed, but the Archdiocese agreed to reimburse the City for the cost of the platform and related construction should there be a final judgment that the City could not constitutionally pay for the items.

The finished platform was an impressive creation that significantly helped beautify the Mass offered by the Pope. Paid for entirely by the City, the platform was cylindrical in shape, 28 1/2 feet high and 144 feet in diameter. Fifty-seven steps, 60 feet wide, extended 110 feet from the platform to the street. On the platform was a 16-step, four-sided pyramid, 45 feet on a side and 14 feet high. On this pyramid was another small, 5-step pyramid upon which was placed a throne used by the Pope. The platform was painted white; the top of the large pyramid and portions of the steps were carpeted in red. In one corner of the large pyramid stood a white, 36-foot high cross. *See* photograph reproduced at 480 F.Supp. 1161, 1170 (E.D. Pa. 1979). The City encircled the platform with nearly $50,000 worth of shrubbery and yellow chrysanthemums. The City also rented

---

1. As taxpayers, plaintiffs have standing to challenge the expenditures allegedly made in violation of the Establishment Clause. Flast v. Cohen, 392 U.S. 83 (1968). Plaintiffs were joined in their actions, respectively, by the American Civil Liberties Union and the National Ministries, American Baptist Churches. The district court also permitted the intervention of several individuals under Fed.R.Civ.P. 24(b).

20,000 chairs for seating of selected guests; it supplied a sound system, part rented and part purchased at a cost of more than $50,000; and it constructed a nearby, separate platform for a 360-voice choir.

On the afternoon of October 3, 1979, Pope John Paul II led a procession from the Cathedral of Saints Peter and Paul to the Logan Circle platform. There he began a service that lasted more than two hours, during which he delivered a homily and personally distributed Communion to 150 worshipers. With him on the platform were a large number of clergy, but no city officials. The 20,000 seats nearest the platform, the chairs rented by the City, were available only to ticket holders, and tickets could be obtained only through the Archdiocese. The platform, illuminated for six days prior to the service, was left in place over Swann Fountain for more than one week after the service, but it was used for no other purpose.

After the Pope's visit had ended, the City and those contesting the City's expenditures presented their arguments before Judge Raymond Broderick of the United States District Court for the Eastern District of Pennsylvania. The plaintiffs opposed only a few items. Not challenged was the City's construction of a platform at the airport, a platform used by city as well as religious officials in welcoming the Pope to Philadelphia. Not challenged was the City's deployment of police along the parade route and at all events attended by the Pope. Not challenged was the Pope's use of public areas such as Logan Circle for his religious activities. Rather, plaintiffs contested only the City's payment for the construction of the platform in Logan Circle, a platform used exclusively for a religious service, and a few other extraordinary expenditures, all a kind never offered to other organizations, religious or non-religious. Specifically, these additional expenditures were for renting of the chairs and a sound system, the planting of shrubbery and flowers, and the building of the smaller platform for the choir.

The plaintiffs argued that such assistance cannot be offered without violating the Establishment Clause of the first amendment of the Constitution.

On November 9, 1979, Judge Broderick, in a scholarly and well reasoned opinion, held that the expenditures were unconstitutional and ordered the reimbursement. 480 F.Supp. 1161 (E.D. Pa. 1979). The amount to be reimbursed totalled $204,569 and included the cost of materials and labor, less the value of reusable items. *See id.* at 1170-71.[2] The City appealed.[3] We affirm.

II.

The first amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The amendment was made binding on the states by the fourteenth amendment. *Everson v. Board of Education*, 330 U.S. 1, 8 (1947). The two religion clauses have stirred deep feelings and their meaning has been much litigated. Although members of the Supreme Court have disagreed on the proper application of the Establishment Clause, *see Committee for Public Education v. Regan*, 444 U.S. 646, 648, 662, 671 (1980); *Everson, supra*, 330 U.S. at 3, 18, 28, a fairly

---

2. The trial court found that the City improperly expended the total sum of $310,741 for the Pope's service. The court, however, readily accepted the City's contention that *all* of the $28,894 spent on lumber, $2,618 spent on bunting, $48,860 spent on shrubbery and flowers, and $5,800 spent on carpeting was recovered by the City because those items were reusable, apparently without diminution of value. Another $20,000 was subtracted from the total of expenditures as the value of reusable sound equipment purchased by the City. 480 F.Supp. at 1170-71.

3. The Rev. Mary Anne Forehand and the Board of National Ministries, American Baptist Churches in the U.S.A., also appealed, No. 79-1785 (Notice of Appeal filed November 27, 1979), but that appeal was dismissed pursuant to the stipulation of the parties on March 19, 1980.

simple statement of the test has evolved: "[A] legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion." *Committee for Public Education v. Regan*, 444 U.S. 646, 653 (1980), *citing Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 748 (1976); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772-73 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). This circuit is familiar with the application of this three-part test. *See Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3d Cir.), *aff'd*, 442 U.S. 907 (1979).

In its analysis of the constitutionality of the City's funding of the construction of the platform and the other extraordinary support for the Logan Circle ceremony, the district court employed the three-part test. 480 F.Supp. at 1166. The City does not contend that some other test should be applied in an examination of the City's actions, but does argue that the district court erroneously applied the test.

Applying the test, the district court found that the challenged expenditures failed to satisfy any of the three requirements of the Establishment Clause. The court concluded that the City's action (1) had primarily a religious purpose and only incidentally a secular purpose; (2) had a primary effect that advanced religion; and (3) created two types of impermissible entanglement: (i) the joint participation in the planning of and preparation for a religious function, and (ii) the promotion of divisiveness among and between religious groups. 480 F.Supp. at 1168-69. We shall now review that application of the law.

A. *Secular Purpose*

The district court found that the construction of the platform had only an incidental secular purpose, and

that the primary purpose of the City's action was religious. 480 F.Supp. at 1167. That a government action has a religious purpose does not mean that it cannot also have a secular purpose sufficient to satisfy this element of the test. For instance, Sunday closing laws have been found to have had a secular purpose in the goal of a uniform day of rest. *McGowan v. Maryland*, 366 U.S. 420, 445 (1961). But not all state actions have passed the test. In *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Court found no non-religious justification for a statute prohibiting the teaching of evolution.

The City of Philadelphia asserts two secular purposes: the first, the protection of the Pope and the crowd, and the second, the possibility of a "public relations bonanza," a purpose first raised on appeal and not apparently considered by the district court. The asserted purpose of protecting the Pope is, at best, suspect. At all other events attended by the Pope, he was protected by, at most, police and barricades. At Logan Circle, the platform was surrounded by barricades and police officers and these, much more than the platform, protected the Pope. Approaching and leaving the ceremony, the Pope passed through the crowd, and at one point during the service he went into the crowd. The City argues that by providing the platform to make the Pope widely visible it prevented a rush of persons attempting to see the Pope. This claim of protection is only partially true because the Pope's position on the platform made him a clear target in any direction. On the other hand, we cannot accept the City's argument as a sufficient secular purpose for the platform in light of its design and primary purpose to create a splendid setting for the religious service. The district court found that the platform was not designed, constructed or used for a civil purpose but for the celebration of Holy Mass by the Pope, assisted by the bishops of the Catholic Church. 480 F.Supp. at 1167. This finding is not plainly erroneous.

Nor can we accept the City's claim of protecting the Pope as a purpose sufficient to justify several of the other contested preparations: the 36-foot high cross; approximately $50,000 in flowers and shrubbery; the $55,950 sound system; and the stand for the choir. Unless some other rational secular purpose is advanced for these expenditures, they, like the statute in *Epperson*, *supra*, must be found unconstitutional. At least some minimal secular purpose must be advanced.

On appeal, the City asserts a public relations purpose, claiming that by funding these extraordinary items, it helped put Philadelphia in a good light. By so arguing, the City places itself in a difficult position. Viewers of the ceremony that do not know of the city-sponsorship are likely to believe only that the Archdiocese, not the City, made a special effort. The Archdiocese, not the City, will receive the public relations "bonanza." But if the city-sponsorship is known, that aid connotes the state approval of a particular religion, one of the specific evils the Establishment Clause was designed to prevent. An auspicious aspect of our pluralistic society is its rich religious diversity. The essential purpose of the Establishment Clause reflects this pluralism. Finally, if some peripheral public relations benefit can constitute a sufficient secular purpose, then the purpose test is destroyed, for it is hard to imagine a city expenditure that will not look good in someone's eyes.[4]

We recognize that it is difficult for a court to ascertain the true purpose behind a governmental action, particularly when the challenged activity is not legislation. *See Allen v. Morton*, 495 F.2d 65, 68 (D.C. Cir. 1973).

4. The City also argues that the Pope was accorded only what was due him as a head of state, and that the purpose behind the expenditures was to honor a head of state. This argument is, on its face, transparent. The Pope never asserted any diplomatic role during his visit to Philadelphia. Rather, all his activities indicate clearly his religious purpose. Also, the type of aid provided by the City was plainly of a type intended to advance religion, not diplomacy

However, we believe that if we are to retain any meaningful purpose test, we must conclude that the district court did not err in finding that the challenged actions of the City were undertaken with a religious purpose. Because the City failed to satisfy the first part of the constitutional test, the district court properly held that the City expenditures violated the Establishment Clause of the first amendment.

B. *Religious Effect*

In *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), the Supreme Court stated that government aid should have "a primary effect that neither advances nor inhibits religion." Similarly, in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 783-85 n.39 (1973), the Court iterated that aid is impermissible if it has "the direct and immediate effect of advancing religion."[5] The state must maintain an attitude of absolute neutrality, neither "advancing" nor "inhibiting" religion. *Id.* at 788. The district court found that the City's action had a primary religious effect under both of the above tests. 480 F.Supp. at 1167-68.

The City presents several imaginative arguments against this finding. First, it asserts that the "unique" nature of the Pope's visit somehow makes the effect not primarily religious, because "there is little risk that the expenditures will have the effect of placing the City's imprimatur of approval on the Catholic religion." We see no merit to that disclaimer. City officials went out of their way to align themselves and collaborate with the Archdiocese. For weeks, representatives of the City and the Archdiocese repeatedly met to discuss the numerous problems involved in designing and constructing the

---

5. Professor Tribe believes the effects test was thus transformed into "*a requirement that non-secular effect be remote, indirect and incidental.*" L. Tribe, *American Constitutional Law*, §14-9 at 840 (1978) (emphasis in original).

platform, including the cross, and planning for the Mass.[6] These meetings were separate and independent of the planning for police and fire functions, emergencies and crowd control. In addition, the district court found that the City had in effect "ceded control of the Logan Circle area to the Archdiocese," 480 F.Supp. at 1167, as evidenced by the Archdiocese's sole responsibility for the distribution of tickets for admission to the area in the vicinity of the platform. Further, regardless of imprimatur, the City's assistance had effectively enabled the Pope to reach large numbers of persons and to perform a religious service. A religious effect of such magnitude may itself be unique.

The City maintains that the "transitory nature" of the aid — the Pope used the platform once and it was removed within two weeks — means that no religious institution was aided. But the aid need not be continuing to have an impermissible religious effect. The service was viewed directly by more than a million persons. It cannot be argued that its effect was not great. The platform itself was, on the City's orders, left standing for more than a week to enable Philadelphians to visit it. The City thus created a temporary shrine. Such activity is not compatible with the Constitution.

Nor can it be argued that any religious effect was too remote. In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court sustained most of the federal Higher Education Facilities Act of 1963 providing aid to all colleges for construction of buildings. The Act permitted

---

6. In note 9, the dissent urges that the City's expenditure on the cross is irrelevant. We disagree. First, only in appellant's brief on appeal was the claim made that the cost was recovered. As an appellate court, we decline to find such a fact when no evidence on the point was offered to the trial court. Second, even assuming that the cost of that particular component was recovered, the City's design of the platform to include the cross and the advance of the funds for its construction are relevant both to the purpose and effect of the City's overall action.

the Government to recover the aid if the federally financed facility were used for sectarian instruction or as a place of worship. However, under the Act, recovery was possible only if the breach occurred within 20 years after completion of construction. The Court found the possibility that a federally financed building might be used for some religious activity more than 20 years later was a sufficient religious effect to render that aspect of the Act, the 20-year limitation, invalid. *Id.* at 683-84. The religious effect there was more attenuated than what we have here.

The City also reasons that any religious effect was the result of the Mass and not the City's providing the platform and related support. If this were true, then the clause struck down in *Tilton, supra*, would have been valid because, by the same argument, the religious instruction and not the building is the root of the religious effect. This claimed distinction between sources of effects would, if accepted, emasculate the Establishment Clause.

The religious effect was both plain and primary. The Pope, admittedly on a pastoral mission to this country, was, with the aid of a magnificent setting provided by the City, able to celebrate a Mass and deliver a sermon. In so doing, he brought a religious message with the help of the City, from the Roman Catholic Church to millions of persons. This is an effect that can only be considered as advancing religion. We therefore affirm the district court's holding that the City's action created an impermissible establishment of religion.

C. *Entanglement*

The district court found the relationship between the City and the Archdiocese constituted entanglement in violation of the third part of the Establishment Clause test. 480 F.Supp. at 1168-69. The problem the district court found was not the necessity of constant govern-

ment monitoring of sectarian actitivies fatal in other cases, but rather was the (1) joint planning with the Archdiocese of the Logan Circle ceremony and (2) the potential for community divisiveness along religious lines that joint planning created. The City disputes each conclusion on the basis that any state-church relationship was not a continuing one.

In *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973), the District of Columbia Court of Appeals found excessive entanglement between the federal Government and the committee running the Christmas pageant. The City attempts to distinguish this case on two grounds: first, the Government in *Allen* had an active role in management of the pageant, with officials holding two of the five positions on the executive committee; and second, the Government "co-sponsored" the pageant, providing labor assistance.

On review, the facts in *Allen, supra*, seem quite similar to those involving the relationship between the City here and the Archdiocese. Despite the City's claim, the only contact between the two was not "to discuss provision of normal government services." Philadelphia Commissioner LaSala, in his desposition, indicated that for each aspect of the preparations, the Philadelphia official in charge had a counterpart in the Archdiocese. Admittedly, the City alone designed the platform, but the design was approved by the Archdiocese before it was built. Finally, the Archdiocese alone handled the access to the 20,000 reserved seats. Admission was by ticket only, tickets available only through the Archdiocese. At the service, Archdiocese "marshals" turned away non-ticket holders from the several square block area where the 20,000 seats were located. Thus, in preparation, joint efforts were the norm, and at the event the religious organization apparently took over some government functions. We therefore affirm the district court's finding of entanglement based on the facts of the preparation.

An alternative basis for the district court's conclusion that the City's activity caused entanglement was a finding that the assistance tended to promote divisiveness among and between religious groups. This basis was recognized in *Lemon v. Kurtzman*, 403 U.S. 602, 622-24 (1971). Again, the City argues that the ephemeral nature of the Pope's visit makes this finding incorrect, reasoning that any divisiveness will be evanescent. Thus, in *Lemon*, statutes providing long-term aid to parochial schools were challenged, but there is no reason to believe that short-term aid of the type rendered here is not as divisive. Judge Broderick's finding of divisiveness was based on the number of plaintiffs. At least three separate groups brought suit to enjoin the City's assistance. We believe the district court could find entanglement from the divisiveness evidenced by the number of legal actions.

Thus, the City's assistance and the extensive cooperation during the preparations for the Pope's visit, also fails the entanglement test, because of the potential for divisiveness.

III.

Throughout this appeal, the City has argued that to find that the City's aid displays an impermissible purpose, effect, or entanglement, would constitute a denial to members of the Archdiocese the free exercise of their religion as protected by the first amendment. For instance, after arguing that any religious effects stem from the Mass, not the City's aid, the City contends that the plaintiffs are really trying to limit the Pope's religious activities, and therefore are attempting to deny his free exercise of religion. Such an argument has only superficial appeal. The free exercise cases, by their nature, arise when the state has denied the right. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court found South Carolina abridged a woman's right to the

free exercise of her religion when the state would not give her unemployment compensation because she refused to work on Saturday, her Sabbath.

The issue in this case is city spending on the platform, shrubberies and related assistance, such as rental of chairs and a sound system, *not* whether the Pope could use city land at Logan Circle for religious purposes or have police protection. The question then is whether the Archdiocese would have a colorable claim against the City for reimbursement if the City had declined the challenged assistance. Such a claim would obviously be without merit. To have the City reimbursed for such expenditures then cannot be denial of the right of free exercise of religion.

O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979), which the City cites repeatedly as supporting their free exercise argument, does not in any way suggest a different conclusion. That case also involved Pope John Paul II's visit to the United States. The Pope held a service on the National Mall at Washington, D.C. The challenge there was primarily directed to this use of the property, a use the court sustained. The City provided police, fences and barriers, and utilities, but these had been regularly provided to every major demonstration raising first amendment values, such as the inhabitants of "Resurrection City," the anti-war protestors at the Moratorium, and recently the farmers who brought their tractors and protests to Washington. The court noted specifically that the Washington Archdiocese would expend in excess of $400,000 for construction of the platform and the altar, other physical and electrical facilities, sound equipment, chairs and clean-up, the very items the City of Philadelphia paid for. In this case, the plaintiffs agree the Pope had a right to use the city property. Their objection is to the extraordinary city expenses, an issue not raised in *O'Hair*.

Nor does *Chess v. Widmar*, No. 80-1048 (8th Cir. August 4, 1980), help the City. The Eighth Circuit, in

deciding that a public university cannot prohibit a recognized student group from using any university facilities to hold religious services was certainly not holding that the university had a duty to erect a special facility for that group. *Chess v. Widmar* would be relevant had the City sought to deny the Pope the use of Logan Circle. *Chess* and the other free exercise cases require only neutrality. They in no way substantiate the City's argument that it had a *duty* to support the Archdiocese by providing extraordinary assistance to the Pope's religious activities.

We conclude therefore that the district court correctly rejected the City's free exercise argument.

IV.

The development of the Religion Clauses of the first amendment began before the First Congress in the struggles in the various states over religious freedom. *See generally Everson v. Board of Education*, 330 U.S. 1, 8-14 (Black, J.), 31-49 (Rutledge, J., dissenting) (1947). In Virginia in 1785, James Madison wrote and circulated his famous "Memorial and Remonstrance" to the General Assembly of the Commonwealth of Virginia. *See id.* at 63. Although Madison's views may not have been shared by a majority of the drafters of the Constitution, *Public Funds for Public Schools v. Byrne*, 590 F.2d 514, 522 (3d Cir.) (Weis, J., concurring), *aff'd*, 442 U.S. 907 (1979), his statements remain instructive when Establishment and Free Exercise Clause issues are raised. Urging the Virginia assembly to defeat a bill that would provide financial support from tax revenues to the clergy of a certain sect, Madison observed that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment." Madison, Memorial and Remonstrance ¶3, *quoted at Everson*, *supra*, 330 U.S. at 65-66. By requiring that the

Archdiocese, pursuant to the order to which it stipulated in September 1979, reimburse the City for the impermissible expenditures, we in no way penalize the Archdiocese. Rather, we are adhering to the venerable principle of neutrality. For if the City can spend in excess of $200,000 directly in support of the Pope's Mass, it can devote half its budget to some other group next year. As Madison did not accept the "arrogant pretension" that "the Civil Magistrate is a competent Judge of Religious truth," *id.* at ¶5, 330 U.S. at 67, we cannot accept the City's decision to support a particular sect. Finally, because we believe, as Madison argued, that such support "will destroy the moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects," *id.* at ¶11, 330 U.S. at 69, we must affirm the district court and order the Archdiocese to reimburse the City of Philadelphia for those expenditures made by the City in violation of the Establishment Clause of the first amendment of the Constitution.

For the foregoing reasons, we hold that the challenged City expenditures violate the Establishment Clause of the first amendment of the Constitution. The Archdiocese of Philadelphia is required, in accordance with the stipulation and order of the district court, to reimburse the City $204,569 that the City unconstitutionally spent in support of Pope John Paul II's Mass at Logan Circle.

The judgment of the district court will be affirmed.

ALDISERT, *Circuit Judge*, dissenting.

Susan B. Gilfillan and the American Civil Liberties Union request a judicial declaration that the expenditure of a *certain portion* of City of Philadelphia funds relating to a two-day visit by Pope John Paul II in October, 1979, was improper under the establishment clause of the first amendment.[1] The City spent approximately $1,200,000 during the papal visit. This lawsuit is a challenge only to those funds expended by the City to erect a platform and buy public address equipment in connection with the celebration of a mass at Logan Circle. The district court agreed with the plaintiffs that the City's expenditure of $204,569 of the total expenditure violated the Constitution. The majority have affirmed. I would reverse and remand these proceedings to the district court with a direction to enter judgment in favor of Philadelphia. In my view, there was a secular purpose for the challenged expenditures, the primary effect was secular, and the narrow relief requested by the appellees and granted by the district court requires the City of Philadelphia impermissibly to entangle itself in religion. This entanglement violates the establishment clause of the first amendment.

I.

This controversy arose from the visit to Philadelphia of Pope John Paul II, head of the Vatican State and spiritual leader of the world's Roman Catholics, as part of a six-city visit to the United States. Pennsylvania's governor, Philadelphia's mayor, and other civil and religious dignitaries greeted him at the airport and the usual welcoming ceremony followed. A motorcade then proceeded

---

1. The parties have not raised the issue of mootness. I have assumed that this is a live controversy. I also do not address this court's authority to order performance by the Archdiocese of Philadelphia, not a party to these proceedings.

through the City to the Catholic basilica at Logan Circle, a public park. Thereafter, the Pope emerged from the basilica leading a religious procession to the public park, mounted a platform, and celebrated a nationally-televised pontifical mass.

The plaintiffs' position before the district court was clear and precise. They contested neither the celebration of mass on public property nor the normal expenditure of public funds for security and crowd control. They assert the same position before this court. Although the City expended approximately $1,200,000 for the papal visit, they challenge only the $204,569 expended for the platform and its appurtenances.[2] Thus, the question presented by this appeal is whether the United States Constitution precludes a municipality from paying these particular expenses incident to the visit of Pope John Paul II.

II.

Had the platform been constructed for a priest, bishop or cardinal visiting the City and celebrating mass

---

2. Counsel for plaintiff-appellees stated at oral argument:

> [W]e have conceded that the visit in its entirety has primarily at least a secular character. That is the arrival at the airport, the platform at the airport where the Pope was greeted by secular officials, bands played, the procession up through Broad Street, all the way up to the point at which the Pope at the head of a religious procession with the forty bishops who helped him go celebrate the mass approached the platform, which was, of course, used for no . . . purpose other than the mass and the sermon. Indeed, no secular foot ever touched that platform except the special eight communicants who came upon it to receive the Holy Eucharist. And the religious character . . . of the visit, however, is one which is perhaps arguable, but which we don't at all challenge. And indeed, the largest expenditures were for those of crowd control and the like. . . . [They were] the largest expenditures. . . . over a million dollars.

Transcript of oral argument at 24-25.

I would have no difficulty agreeing that the expenditure violated the establishment clause. But Pope John Paul II is no ordinary bishop; he is the head of a secular state, albeit a theocratic one. The Holy See is an independent papal state, located in Vatican City, emerging from the Lateran Pacts entered into by Pope Pius XI and the Kingdom of Italy in 1929. These pacts provided that, in return for recognition of the secular Italian government by the Holy See, the Pope would be provided with a small, independent political enclave, a large sum of money as compensation, and recognition of the Roman Catholic faith as the state religion of Italy. These pacts have remained essentially unaltered since their ratification.

Sovereignty in this independent papal state is exercised by the Pope upon his election as the head of the Catholic Church. He has absolute executive, legislative, and judicial powers within the city. Administrative powers are delegated to a governor who is also permitted to compile legislation. The governor is in turn assisted by a central council. The principle sources of objective law in the Holy See are the *Codex juris canonici* and the apostolic constitutions, although the penal code of Italy applies within its boundaries.

The Holy See has civil courts in addition to its religious courts, although most civil offenses are tried in Italy. There is a diplomatic corps of approximately sixty persons who serve as legates (ambassadors). In addition, apostolic delegates serve in nations without formal diplomatic relations with the Vatican, including one to the United States.

The papal state has its own telephone and telegraph system, post office, railroad station, radio station, banking system, stamps, currency, pharmacy, jail, and flag. Vatican "papers" are given to citizens, who consist primarily of permanent Vatican employees. The state is in all ways independent of Italy, although the Italian gov-

ernment does provide certain services, including police to aid in security and crowd control.[3]

As a theocratic state, the Holy See is not unique. Israel, for example, is its Jewish counterpart. The religious nature of the State of Israel is disclosed by the circumstances surrounding its establishment on May 14, 1948. Its creation fulfilled the historic dream of the Jewish people that stemmed from their belief in God's promise that the land of Israel would one day be theirs. Excerpts from the "Declaration of the Establishment of the State of Israel" emphasize the religious significance of the date:

> Eretz-Israel was the birthplace of the Jewish people. Here their spiritual, religious, and political identity was shaped. Here they first attained to statehood . . . and gave to the world the eternal Book of Books.
>
> . . . .
>
> In [1897] . . . the First Zionist Congress convened and proclaimed the right of the Jewish people to national rebirth in its own country.
>
> The right was . . . re-affirmed in the Mandate of the League of Nations which . . . gave international sanction to the historic connection between the Jewish people and Eretz-Israel and to the right of the Jewish people to rebuild its National Home.
>
> . . . .
>
> Accordingly, we . . . representatives of the Jewish community of Eretz-Israel and of the Zionist movement . . . hereby declare the establishment of . . . the State of Israel.
>
> . . . .

---

3. *See generally* A. Blaustein & G. Flanz, eds., Constitutions of Dependencies and Special Sovereignties, *Vatican City State* (1976).

> We appeal to the Jewish people throughout the Diaspora to rally round the Jews of Eretz-Israel . . . and to stand by them in the great struggle for the realization of the age-old dream — the redemption of Israel.[4]

The Law of Return, for example, announces the right of every Jew to settle in Israel. The World Zionist Organization — Jewish Agency (Status) Law regulates the relationship of the World Zionist Organization in Israel to the state. Other laws relating to religion govern such matters as *kosher* food for soldiers, religious service budgets, and the Chief Rabbinate Council. Whenever new legislation is needed, the relevant principles of Jewish law are examined first. If they are found to be suitable, they are incorporated into the law.[5]

So close is the relationship between members of the Jewish faith and Israel that Israeli Prime Minister Menachem Begin, arguing that criticism of Israel by the French government provoked acts of anti-semitism in France, recently stated: "The incitement against the Jewish state is, objectively speaking, incitement against the Jewish people."[6]

Another theocratic state is the newly-created Islamic Republic of Iran. Principle 4 of its constitution states:

> All civil, penal, financial, economic, administrative, cultural, military, political, etc., laws and regulations should be based on Islamic rules and standards. This principle will absolutely or in general be dominant over all of the principles of the constitution, and other laws and regulations as well, and any determination in this connection will be made by the religious jurists of the Council of Guardians.

---

4. A. Blaustein & G. Flanz, eds., 6 Constitutions of the Countries of the World: Series of Updated Texts, *Israel*, vol I, pp. 3-5 (1973).

5. 9 Encyclopedia Judaica *Israel* 651 (1971).

6. The New York Times, October 14, 1980, §A at 9, col. 1.

Principle 5 states that the "religious leader and Imam" of Iran is a substitute for the missing Shiite guide, the twelfth Imam who disappeared eleven centuries ago and is expected to return.[7]

These examples illustrate the difficulties inherent in the majority's implicit distinction between heads of secular states and heads of religious states. Under the majority's analysis, the extension of diplomatic courtesies and security to Pope John Paul II must be carefully segmented into numerous contexts. More important, however, is the failure of the majority to recognize that although the Pope's following is largely, but not totally, a result of his religious status, the size of that following raises security and safety concerns for the City of Philadelphia that cannot be neatly characterized as "religious."

III.

This case is unique because it requires examination of a one-time expenditure of municipal funds incident to the visit of a foreign dignitary who also heads a religion. The plaintiff-appellees rely on a novel and elusive distinction between municipal expenditures for a reception platform at the Philadelphia airport, from which Pope John Paul II extended a blessing to all observers, and expenditures for a platform at Logan Circle, from which he conducted mass and distributed the Holy Eucharist. Although there is no controlling precedent for these unique facts, some direction is forthcoming in the standards developed by the Supreme Court for analysis of expenditures in aid of religious schools. The Court announced these standards in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971):

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the

7. English translation of Iranian Constitution provided by the Iran Working Group, United States Department of State.

> Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz* [*v. Tax Commission*, 397 U.S. 664, 674 (1970)].

My difference with the majority is in the emphasis I place on the City's concern with safety and security and with its reputation in the eyes of the world. Although the majority are correct that the expenditures at issue aided the Catholic Church,

> [t]he prohibition of enactments respecting the establishment of religion [does] not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together, any more than the other provisions of the First Amendment — free speech, free press — are absolutes.

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 255-56 (1948) (Reed, J., dissenting). In my view, these two secular concerns, the safety and security of its citizenry and enhancement of its reputation as an attractive city, justified Philadelphia's expenditures.

A.

Both the district court and the majority have concluded that the primary purpose behind the expenditures was nonsecular and therefore forbidden under the establishment clause. Neither opinion, however, cites evidence of the City's intent in undertaking the expenditures. They rely instead on the rather simplistic assertion that because the platform was used for celebration of Mass and the Holy Eucharist, the City's *primary* mo-

tivation must have been sectarian. *See* Maj. op. typescript at 7-9; 480 F.Supp. at 1166. This reasoning merely assumes that the justifications offered by the City are pretextual; it fails to explain why the benefit to the Catholic Church was not an incident to the predominant purpose of public safety.

Viewed against the recent historical setting available to the City immediately prior to the Pope's visit, the City could have reasonably reached three purely secular conclusions. First, Pope John Paul II's position as head of the Catholic Church, as well as his much publicized personal charisma, would draw a huge crowd of Catholics and non-Catholics to his outdoor appearance at Logan Circle. Second, the safety of the expected crowd, for which the City remained primarily responsible, would be endangered if the Pope were not visible to a large percentage of the persons in attendance. The City argues that their officials wished to avoid "the shoving and pushing" like that which later led to the May 4, 1980, tragedy in Zaire when nine people were trampled to death during the papal visit there.[8] Finally, City officials could have concluded that an essential means of controlling the expectant crowd would be assurance that the Pope would be visible to and heard by the crowd. This conclusion led quite rationally to the purely secular decision to build the platform and purchase sound amplification equipment.

The other challenged expenses include money spent on shrubbery and flowers.[9] Although the secular purpose for these expenditures is not as compelling as the desire to safeguard the lives of those in attendance, the City of Philadelphia could have anticipated wide me-

---

8. Transcript of oral argument at 52.

9. The majority's repeated reference to the wooden cross erected at City expense is now irrelevant. The City sold the cross after the papal visit at no financial loss, and it is not included within the district court's order. Appellant's Brief at 18.

dia coverage and desired to make the most of the papal visit's public relations benefit to the City. Because the shrubbery and flowers played no part in the ceremony, the majority's attempt to include them within a class of forbidden expenditures is unpersuasive. In addition, the district court found that these items were totally reusable, and the taxpayer-appellees have suffered no cognizable loss by these particular expenditures.

Finally, the appellees emphasize that the Church, not the City, was primarily responsible for distributing tickets for seats close to the platform. This observation carries little weight because the persons most subject to physical peril by crowd disorders were not the persons nearest to the platform, but persons farthest from it. Persons at the rear of the crowd would be least able to see or hear without the platform and amplification equipment, and would be most likely to surge forward, endangering lives at the edge of the crowd. If the City's sole concern were for the safety of the Pope, or even for the dignitaries on or in proximity to the platform, police barricades would have been sufficent. In my view, however, the more difficult security problem was the outlying crowd, and I cannot fault City officials for resolving it as they did.

In sum, therefore, I part with the majority's secular purpose analysis in my emphasis on the safety of the crowd, not of the papal visitor. Pope John Paul II's ability to draw excited throngs may or may not be attributable to his religious position, but Philadelphia's recognition of that ability, and preparation for it, is certainly secular. Plaintiff-appellees "have conceded that the visit in its entirety has primarily at least a secular character." Note 2, *supra*. The religious intent of the City was at most incidental to its primary concern with the safety of its citizens. I do not disagree that the platform was used for a religious ceremony, but the lingering question is what would have occurred in the absence of a platform. Perhaps the Archdiocese would have built a platform; but

perhaps, as in Zaire, it would have depended on traditional modes of assuring safety. In Justice Frankfurter's phrase, "[i]n light of these considerations, can it reasonably be said that no substantial non-ecclesiastical purpose relevant to a well-ordered social life exists . . .?" *McGowan v. Maryland*, 366 U.S. 420, 504-05 (1961) (Opinion of Frankfurter, J.). I must answer this question negatively.

B.

The second part of the test for establishment clause violations is whether the primary effect of the expenditures neither advances nor inhibits religion. In applying this criterion, however, we as jurists should recognize that our guidance comes not from the text of the Constitution, "but [from] our own prepossessions." *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 238 (Jackson, J., concurring). Application of this criterion is not greatly aided by prior Supreme Court decisions, which "lack . . . a principled and logical thread." *Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d 514, 521 (3d Cir.) (Weis, J., concurring), *aff'd without opinion*, 442 U.S. 907 (1979).

In examining governmental action under the primary effect criterion, we do well to remember that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976) (Blackmun, J., joined by Burger, C.J., and Powell, J., announcing the judgment of the Court). Total separation between church and state is neither possible nor constitutionally mandated. *See Lemon v. Kurtzman*, 403 U.S. at 614; *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). The proper analysis must determine whether the primary *and substantial* effect of the expenditure was in aid of religion.

Philadelphia's concern with the safety of the throng present for Pope John Paul II's ceremony, discussed

supra, was manifested in the expenditures incurred. The absence of disturbances in the unprecedented crowd should not be overlooked. The considerations outlined above that motivated the City to provide the platform and public address equipment support the conclusion that the primary effect of these expenditures was crowd control. The mass would have occurred regardless of the expenditures, but may have been accompanied by tragedy.

Like the *Walz* Court's determination of "minimal and remote involvement" in granting tax exemptions to properties used for religious worship, I believe the same characterization applies to a *one-time* use of a wooden platform in conjunction with a papal visit to Philadelphia. Although a portion of the Catholic liturgy was performed on the platform, that ceremony consumed only a short period on a single day. It was not repeated like the daily reading of a prayer in a schoolroom. The Court has noted that "[t]he problem, like many problems in constitutional law, is one of degree." *Zorach*, 343 U.S. at 314. As Justice Jackson wrote, "[m]usic without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view." *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 236 (Jackson, J. concurring). Similarly, a secular welcome by Philadelphia to the head of the Holy See, without the pomp and splendor of a papal mass, would also be "eccentric and incompiete."

To permit the celebration of a mass in a public place, as the appellees concede we should, but to abjure an elevated platform from which the Pope would be made visible to a million people, or an amplifying system which would carry his voice to them, and to deny the City the right to decorate Logan Circle with flowers, a world-wide symbol of hospitality, is, in my view, sheer sophistry. No constitutional scholar, on or off the bench, has previously defended such a diaphanous distinction.

Appellees in this case predicate their challenge to Pope John Paul II's visit on grounds that require the court to examine the fine line closely. They challenge only one-sixth of the City's total expenditures for the two-day visit. They do not challenge the use of public property for the situs of the mass. They question only the labor and materials for the erection of the platform, the planting of shrubs and flowers, and the rental of sound equipment and chairs. I presume that had Pope John Paul II conducted mass at ground level with no chairs or amplification system, there would have been no lawsuit. *See O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979).

More than a million people attended the gathering at Logan Circle. The papal mass was not solely for the Catholics in attendance and was not the primary purpose of the visit to the city. The commemorative supplement produced by The Philadelphia Inquirer and KYW-TV[10] referred to "the mood of the throngs of Catholics, Protestants, blacks and whites who awaited the Pope" at the mass. This two-or-three hour event deserves the same treatment as other practices previously determined not to have a principal or primary effect of advancing religion, such as the singing of Christmas carols and the commemoration in public schools of Christmas, Easter, Passover, Hannukah, St. Valentine's Day, St. Patrick's Day, Thanksgiving, and Halloween. *See Florey v. Sioux Falls School District*, 619 F.2d 1311, 1319-20 (8th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3351 (November 11, 1980).[11] Relative to the impressive security concerns, the religious effect produced by Philadelphia's expenditures in this case is neither primary nor substantial.

---

10. "Pope John Paul II in Philadelphia," distributed to the court at oral argument by appellees.

11. Other analogous examples of state action not deemed offensive to the establishment clause include providing non-public school students with textbooks, standardized testing and scoring services, and diagnostic, therapeutic, and remedial services, *see*

C.

I turn now to the issue of excessive government entanglement with religion. The appellees' entanglement analysis hinges on two arguments. First, they emphasize the close contact between the City and Archdiocese in planning for the papal visit, and the exclusive distribution of tickets by the Archdiocese. In light of the safety concerns surrounding the Pope's visit, it is not surprising that the City and Archdiocese worked closely together. What this analysis fails to establish is that any substantial increase in contact arose from the construction of the platform over what would have occurred had the City expended no money other than for police escorts and direct protection. Similarly, the distribution of tickets would seem the normal province of the Archdiocese. In addition, as previously noted, the recipients of tickets were not the people evoking the most concern because they would be able to hear and see without aid, and therefore were not expected to become unruly.

The second part of the appellees' entanglement analysis emphasizes the potential for political divisiveness generated by the expenditures. The risk of divisiveness is diminished, however, because of the one-time nature of the expenditures. *See Roemer*, 426 U.S. at 765-66 (Blackmun, J., joined by Burger, C.J., and Powell, J., announcing the judgment of the Court). The

---

NOTE 11—(*Continued*)

Wolman v. Walter, 433 U.S. 229 (1977), non-categorical grants to private colleges, including religious institutions, *see Roemer v. Board of Public Works*, 426 U.S. 736 (1976), secular textbooks on an equal basis to children attending public and religious schools, *see Meek v. Pittenger*, 421 U.S. 349 (1975); *Board of Education v. Allen*, 392 U.S. 236 (1968), publicly financed transportation for parochial school children, *see Everson v. Board of Education*, 330 U.S. 1 (1947), and financial aid to church related colleges for construction of buildings, *see Hunt v. McNair*, 413 U.S. 734 (1973). *See also Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d at 522 (Weis, J., concurring).

number of plaintiffs has never been an accurate index of political divisiveness, and should not be. Courts are available for dispute resolution; the mere filing of a lawsuit does not connote the extreme political and religious divisiveness with which the drafters of the first amendment were familiar.

In my view, the very theory advanced by appellees requires the City to violate the establishment clause. They concede that the platform constructed by the City at the airport did not violate the establishment clause, even though the Pope pronounced a blessing from it.[12] The distinction urged by appellees between the Logan Circle platform and the airport platform would require the City to evaluate "the religious context of a religious organization [and] is fraught with the sort of entanglement that the Constitution forbids." *Lemon v. Kurtzman*, 403 U.S. at 620. It would require a court to engage "in a searching and therefore impermissible inquiry into church polity." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976). The plaintiff-appellees suggest that the City, or a civil court, assume the role of a liturgical expert, separating out expenditures in support of blessings pronounced by Pope John Paul II and expenses for crowd control during celebration of a mass. The executor of this theory, however, would be required to disallow funds for construction of a platform for the same mass.

Judge Leventhal's statement for the United States Court of Appeals for the District of Columbia Circuit in *O'Hair v. Andrus* is also appropriate here:

> Appellants conceded at trial and at oral argument that the Pope could be issued a permit to deliver a sermon, arguing that it is the unique religious nature of the Mass that sets it apart. This contention runs counter to the principles of the First Amendment by hopelessly entangling the government with

12. *See* transcript of oral argument at 26.

> religion. Such a distinction would involve the government in the task of defining what was religious and what was non-religious speech or activity — an impossible task in an age where many and various beliefs meet the constitutional definition of religion. The administration of such a test would impermissibly entangle government and religion.

613 F.2d at 936 (footnote omitted). The argument advanced by appellees and accepted by the majority would require a governmental entity to examine each activity of the Pope, categorizing each as religious or secular. As this case demonstrates, these distinctions are not clear, and the determinations cannot be made without substantial intrusion by the state in matters primarily religious.

IV.

The court's holding today may have little precedential value in the event of future visits to Philadelphia by the head of the Holy See. It is doubtful that he will return during the lives of those who welcomed him. Nevertheless, I have an abiding fear that this ruling will have a direct effect on government relations with other religious states, some of which receive direct financial aid from the United States. The lesson of the district court, affirmed by this court today, is that governmental finances expended for or on behalf of such nations must always be carefully, if not meticulously, examined to determine the precise portion of the funds that may be devoted to arguably religious purposes. I believe that this examination will excessively entangle the government in religious affairs in the future.

Because of the dangers of this excessive entanglement in the case at bar and because the primary purpose and effect of the City's expenditures for the platform were secular, I would order judgment in favor of the City of Philadelphia. Accordingly, I dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2786

GILFILLIAN, Susan Jane B., REV. FOREHAND, Mary Anne

and

REV. WEIDER, Walter, REV. KOPKE, Bryan, SMITH, Bertha R., HERRMAN, Herbert S., BYE, Gerard H., MONTANARO, Antoinette, CALTER, Elizabeth M., MILN, Martha Walker, FOX, Paul H., SCHULTE, Janice,

Intervenors in D.C.,

vs.

CITY OF PHILADELPHIA, MAYOR RIZZO, Frank L., MANAGING DIRECTOR LEVINSON, Hillel S., CITY REPRESENTATIVE LA SALA, Joseph A., COMMISSIONER OF PUBLIC PROPERTY SILVER, Robert,

CITY OF PHILADELPHIA,

Appellant.

(D. C. Civil No. 79-3377)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, ROSENN and GARTH,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on September 15, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed November 13, 1979, be, and the same is hereby affirmed. Costs taxed againt appellant.

ATTEST:
/s/ Sally Mrvos
SALLY MRVOS
Clerk

December 30, 1980

Certified as a true copy and issued in lieu of aformal mandate on January 21, 1981.

Test: SALLY MRVOS

Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellees, Susan Jane B. Gilfillan and American Civil Liberties Union, as follows:

Brief $79.54